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No. 15219

United States
Court of Appeals
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J. PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His Wife; DONALD F. OWENS and JEAN OWENS, His Wife; EDWARD R. ESTER and LORRAINE M. ESTER, His Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeals from the United States District Court for the Western District of Washington, Northern Division.

FILED
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PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-16-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Seattle, Washington,

For Appellee United States of America.

United States District Court, Western District of Washington, Northern Division

No. 3804 ——

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CENTURY INVESTMENT CORPORATION, a Corporation; HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation; A. E. SHERMAN and JANE DOE SHERMAN, His Wife; VIRGIL J. PAGUE and JANE DOE PAGUE, His Wife; CARL W. PAGUE and JANE DOE PAGUE, His Wife; ARTHUR G. BARNETT and JANE DOE BARNETT, His Wife; EDWARD R. ESTER and JANE DOE ESTER, His Wife; and DONALD F. OWENS and JANE DOE OWENS, His Wife,

Defendants.

COMPLAINT

I.

The defendants Century Investment Corporation and Hartford Accident & Indemnity Company, are corporations and have a principal place of business and a resident agent within the Northern Division of the Western District of Washington. That all other defendants are residents of the Northern Division of the Western District of Washington. Jurisdiction is based on Title 28, U.S.C. Section 1345.

II.

That on or about July 14, 1953, the defendants, A. E. Sherman, Virgil J. Pague and Century Investment Corporation, entered into a contract in writing with the Director of the Public Housing Administration, an agency and department of the United States of America, and representing the United States of America, said contract being comprised of three separate documents which are the Invitation to Bid, attached hereto and marked Exhibit "A"; the General Conditions, attached hereto and marked Exhibit "B"; and the Offer and Acceptance of Offer, attached hereto and marked Exhibit "C"; all of which documents are by this reference incorporated herein as though fully set forth.

III.

That paragraph 2, beginning on page 1 of the Offer and Acceptance of Offer of said contract, Exhibit C, provides as follows:

> "The Purchaser offers and agrees to purchase from the seller and to remove the property set forth and described in attachment A, attached to the Invitation to Bid and General Conditions, and to clean the building site or sites, such offer being governed by and subject to the General Conditions covering the sale of such property at the purchase price as listed by the Purchaser on Attachment A."

That paragraph 2, beginning on page 1 of the General Conditions of said Contract, Exhibit B, provides as follows:

"* * * The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. * * *"

That paragraph 6, beginning on page 2 of the General Conditions of said Contract, Exhibit B, provides as follows:

"* * * and shall complete the removal of the buildings or structures and all clean-up operations within a reasonable period not to exceed the period of time specified in paragraph 3 of the Invitation to Bid. In the event the purchaser fails to complete the removal and clean-up operations within such period of time, the Government may take possession of any property still on the site, destroy and otherwise dispose of it, and may charge the Purchaser with the cost of removing the dwellings and cleaning up the site without crediting the Purchaser with the salvage value of the material or construction work removed."

That paragraph 3, beginning on page 1 of the Invitation to Bid of said Contract, Exhibit A, provides as follows:

"Purchaser will provide the Housing Authority of the City of Seattle with a Performance Bond in accordance with the following schedule:

"No. of Sales Units Purchased: 3 sales units and over.

"Amount of Bond: $5,000.00.

"Time Allowed for Completion of Work: 120 days from acceptance of offer.

"* * *"

IV.

That the completion date for the removal of said temporary buildings under the terms of the contract was not later than November 2, 1953. That said temporary buildings and the real property upon which they are presently situated are located in the City of Seattle, County of King, State of Washington, and more particularly described as follows:

Building #102, located at 6500 Maynard Avenue, Seattle, on Lots 2, 3, 4, 5, 6 and 34, all in Block 11, McLaughlin's Waterfront Addition to the City of Seattle;

Building #103, located at 6528 Sixth Avenue South, Seattle, on the South 35 feet of Lot 10, all of lots 11, 13, 14, 30 and 31, all in Block 11, McLaughlin's Waterfront Addition to the City of Seattle;

Building #104, located at 6542 Sixth Avenue South, Seattle, on Lots 15, 16, 17, 18 and parts of 19, 20 and 23, all in Block 11, McLaughlin's Waterfront Addition to the City of Seattle;

Building #105, located at 6361 Maynard Avenue, Seattle, on Lots 21, 22 and parts of Lots 19, 20 and

23, all in Block 11, McLaughlin's Waterfront Addition to the City of Seattle.

V.

That on July 14, 1953, a Performance Bond in the sum of $5,000.00 was executed by Century Investment Corporation, through Virgil J. Pague, its President, as principal, and by the Hartford Accident and Indemnity Company, as surety, in favor of the Housing Authority, City of Seattle, Washington, acting as the agent of the Public Housing Administration, to insure the condition that the obligation of the Century Investment Corporation that it would do all the work and furnish all the materials for the removal of buildings and site clearance and faithfully perform all the conditions of said contract.

VI.

That the defendants, A. E. Sherman, Virgil J. Pague, Arthur G. Barnett, Carl W. Pague, Donald F. Owens and Edward R. Ester, acting individually and in behalf of the marital communities composed of themselves and their wives, purchased said temporary buildings from the Century Investment Corporation, and in open and flagrant violation of the terms of said contract, have rented or leased certain dwellings and apartments located in said temporary buildings, contrary to the terms and conditions of said contract.

VII.

That the defendant, A. E. Sherman, asserts or claims some right, title and interest in and to said

property adverse to the claim of the other defendants here in and adverse to the rights of the United States in and to said property, which claim of lien or interest is subordinate to that of the plaintiff herein.

VIII.

That the plaintiff, United States of America, at all times herein mentioned, had and does now have exclusive use of said real property upon which said temporary dwellings are presently located and the acts of the defendants alleged herein have damaged and are damaging the plaintiff's exclusive use of said land and are in flagrant violation of the laws of the United States of America relating to temporary war housing.

IX.

That the defendants, and each of them, knowingly acted in direct violation of paragraph 8, beginning on page 2 of the General Conditions of said Contract, Exhibit B, which provides as follows:

> "Assignment. Neither this contract nor any interest therein shall be assigned or transferred by the Purchaser to any other party. (Section 3737, Revised Statutes, as amended, 41 U.S.C. 15.)"

Wherefore, plaintiff, United States of America, prays for judgment against the defendants, and each of them, and marital communities composed of them, as follows:

1. Require the Century Investment Corporation and its surety, Hartford Accident & Indemnity Com-

pany to affirmatively and forthwith remove the temporary buildings in accordance with the terms of the removal contract and the mandatory requirement of the Lanham Act.

2. Restrain and enjoin any and all parties from interfering with the plaintiff's interest in the personal and real property and the temporary buildings located thereon.

3. Allow damages to the plaintiff for the failure of the Century Investment Corporation to complete its removal contract by November 2, 1953, and requiring the plaintiff to extend its term of exclusive use of said property from February 21, 1954, to February 20, 1955.

4. An accounting by all parties of the funds collected by said defendants from tenants or from other sources by reason of the unauthorized use of said temporary buildings and the land upon which they are situated.

5. Allow a reasonable rental value to the plaintiff for said property by reason of the use of said property by the defendants herein.

6. That the title of the defendants to said temporary buildings be forfeited and that the plaintiff, United States of America, shall have the full and complete title to said temporary buildings, free and clear from any and all charges, interest, claims, liens and encumbrances of any kind whatsoever.

7. For such other and further relief as to the court may seem just and equitable and for its costs and disbursements herein to be taxed.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ RICHARD J. HARRIS,
Assistant United States Attorney,

/s/ JOHN A. ROBERTS, JR.,
Assistant United States Attorney.

EXHIBIT "A"

Housing and Home Finance Agency
Public Housing Administration

Invitation to Bid

Sale and Removal of Buildings and Site Clearance

Project No.: WASH-45302.

Location: Michigan St., between
4th Ave. South &
Maynard Avenue,
Seattle, Washington.

1. By notice first published on May 21, 1953, the United States of America, acting through the Public Housing Administration of the Housing and

Home Finance Agency and the Housing Authority of the City of Seattle, Washington, has offered to sell for off-site removal the property as follows and hereinafter listed on Attachment A.

> 24—1 story apartment-type buildings, containing 144—1 bedroom units, offered in 10 sales units, each including a concrete and tile service unit.

The dwelling units are of frame construction, all one-story, with mineral surface siding exteriors on 2"x4" studs, wallboard interior walls, single fir floors over 2"x6" joists—16" o.c., solid roofs built up over 2"x6" rafters—16" o.c., and concrete foundation piers. Most units contain electric hot plate, ice-box, single sink, shower stall, toilet bowl and tank, and wash basin. Certain items of dwelling furniture will be included with some of the units.

Equipment in the service buildings includes converted oil-burning furnace, hot water heater and storage tank, and fuel tank.

Condition of buildings and contents is "where is, as is," except for plywood covers over windows and doors, which are not included in the sale.

Each sales unit is offered separately and purchasers may remove from the site in any feasible manner, either intact or as salvage material.

Arrangements to inspect vacant buildings may be made by telephoning the Manager at Lander 2600, Mondays through Fridays, between the hours of

9:00 a.m. and 4:00 p.m., or calling at the project office, 225 Juneau Street.

2. Sealed bids in duplicate must be submitted not later than the time scheduled below for the bid opening. Bids shall be enclosed in two envelopes (outer and inner), both of which shall be sealed and clearly marked "Bid for Purchase and Removal" and addressed to the Housing Authority of the City of Seattle, 825 Yesler Way, Seattle 4, Washington. Other information pertaining to this offering may be secured from the Housing Authority of the City of Seattle.

Bids Will Be Publicly Opened at the Above Address at 2:00 P.M. on June 23, 1953

3. Purchaser will provide the Housing Authority of the City of Seattle with a Performance Bond in accordance with the following schedule:

No. of Sales Units Purchased: Up to 2 sales units.

No. of Sales Units Purchased: 3 sales units and over.

Amount of Bond: $300.00 per sales unit.

Amount of Bond: $5,000.00.

Time Allowed for Completion of Work: 75 days from acceptance of offer.

Time Allowed for Completion of Work: 120 days from acceptance of offer.

as required under Paragraph 2 of the General Conditions.

4. All offers except those from Federal, state or local government bodies shall be accompained by a deposit securing the offer. Said deposit shall be in the form of a certified or cashier's check or money order payable to the Housing Authority of the City of Seattle and shall be in the amount of five per cent (5%) of the bid up to $10,000 and two per cent (2%) of any amount in excess of $10,000. The amount of the deposits made by successful bidders in accordance with this paragraph shall be applied against the purchase price. When an offer is accepted, the unsuccessful bidders will be so notified and the checks or money orders of all unsuccessful bidders shall be immediately returned to them. Checks or money orders may be held by the Housing Authority of the City of Seattle without deposit and at the bidder's risk until the successful bidders are selected.

EXHIBIT "B"

Housing and Home Finance Agency
Public Housing Administration

General Conditions

1. The property available for sale is described in the Invitation to Bid annexed hereto and made a part hereof.

2. Performance Security. The Purchaser shall within five days of the delivery to the Purchaser of

an executed copy of the contract supply (in addition to payment in full of the contract price) performance security in the form of a certified check, cashier's check or money order payable to the Seattle Housing Authority in the amount required under Section 3 of the Invitation to Bid, or shall supply a performance bond in a like amount. The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security.

3. Scope. (a) The Purchaser shall furnish all labor and material, perform all work, and assume all expenses necessary to accomplish the following:

(1) Remove buildings with wood floors down to ground level, including wood, brick or concrete block foundation posts or piers; remove all concrete, including slabs and entrance walks;

(2) Take down, preserve, and replace as directed, telephone, telegraph or other wires or fences and their appurtenant poles or posts or other interferences which may obstruct the removal of the buildings; excepting those serving buildings not included in this contract;

(3) Have all services, such as water, gas, steam, electricity and telephones, disconnected at the service mains in accordance with the rules and regulations of the owners of the utility involved or the local municipality. Securely cap and seal all storm and sanitary sewers leading from structures to be removed and backfill only after inspection by the Contracting Officer. Cap water service line at foot of riser to dwelling. Preserve all active utilities traversing the project site;

(4) Remove all salvage (except as specified herein) and debris resulting from the operation and all tools and apparatus from the site, restore the site of the buildings, as far as possible, to its condition immediately prior to the removal of the buildings by filling solidly any holes or trenches resulting from the operation and leave the site clean and free from hazards, all to the satisfaction and approval of the Contracting Officer.

(b) In the performance of the foregoing work the Purchaser shall at all times provide adequate protection to persons and property, and to prevent spread of dust and flying particles; provide water and necessary connections therefor; and shall avoid interfering with the use of the adjacent buildings or interruption of free passage to or from the same.

(c) The Purchaser shall use no dynamite nor powder and do no blasting on the site and shall not

burn materials or debris on the site without the specific permission of the Contracting Officer.

4. Licenses and Permits. The Purchaser shall obtain and pay for all required permits, licenses and fees necessary in connection with its work, without cost or expense to the Government.

5. Liability for Protection. The Purchaser shall assume responsibility and be liable from and after the date of delivery to the Purchaser of an executed copy of this contract, for the care and protection of the property conveyed by this instrument.

6. Time and Commencement and Completion of Work. The Purchaser shall not commence work until he has made payment in full of the purchase price and until delivery to the Housing Authority of the Performance Security required under Paragraph 2 hereof and shall complete the removal of the buildings or structures and all clean-up operations within a reasonable period not to exceed the period of time specified in Paragraph 3 of the Invitation to Bid. In the event the Purchaser fails to complete the removal and clean-up operations within such period of time, the Government may take possession of any property still on the site, destroy and otherwise dispose of it, and may charge the Purchaser with the cost of removing the dwellings and cleaning up the site without crediting the Purchaser with the salvage value of the material or construction work removed.

7. Officials Not to Benefit. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit

8. Assignment. Neither this contract nor any interest therein shall be assigned or transferred by the Purchaser to any other party. (Section 3737, Revised Statutes, as amended, 41 U.S.C. 15.)

9. Covenant Against Contingent Fees. Purchaser warrants that no person or agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial agencies maintained by the Purchaser for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or in its discretion to require the Purchaser to pay, in addition to the contract price or consideration, the full amount of such commission, percentage, brokerage, or contingent fee.

10. Non-Discrimination. There shall be no discrimination by reason of race, creed, color, national origin or political affiliations, against any employee or applicant for employment qualified by training and experience, for work in connection with this contract.

11. Definitions. The term "Contracting Officer" shall mean the person signing this contract for the Government or his duly authorized successor in office and any person authorized to act for him as his duly authorized representative.

12. Notice of acceptance of offer shall be made by depositing in the United States mails a notice addressed to the Purchaser at the address designated in the offer.

13. This offer shall remain in effect for 60 days from the date of the opening of bids and thereafter until accepted or rejected by the seller, or withdrawn in writing by the bidder.

14. If a government agency has requested in its offer time beyond the end of said period to acquire funds to purchase or to obtain transfer of funds and the Public Housing Administration has determined that additional time shall be allowed, the date of settlement shall be so extended.

15. All work performed in connection with this contract shall be paid for at not less than the prevailing wage scale paid in Seattle, Washington.

EXHIBIT "C"

Housing and Home Finance Agency
Public Housing Administration

Offer and Acceptance of Offer
(Sale and Removal of Buildings and Site Clearance)

Contract No.: (Wash. 45302-SF) d-1,
Disposal Unit No.:
Total Sales Price: $23,364.00.

Project No.: Wash. 45302,
Location: Seattle, Washington,
Date: June 22, 1953.

To: Public Housing Administration,
c/o Housing Authority of the City of Seattle,
Seattle, Washington.

1. The undersigned, hereinafter referred to as the "Purchaser" has been furnished by the United States of America, acting through the Public Housing Administration, a constituent of the Housing and Home Finance Agency, hereinafter referred to as the "Seller," with a copy of the General Conditions and the Invitation to Bid, setting forth the conditions under which the property will be sold.

2. The Purchaser offers and agrees to purchase from the Seller and to remove the property set forth and described in Attachment A, attached to

the Invitation to Bid and General Conditions, and to clean the building site or sites, such offer being governed by and subject to the General Conditions covering the sale of such property, at the purchase price as listed by the Purchaser on Attachment A.

3. The Purchaser transmits herewith a certified or cashier's check or money order in the amount of Seven hundred sixty-seven and 28/100 Dollars ($767.28) payable to the Seattle Housing Authority to be held and applied as set forth in the Invitation to Bid.

4. This offer shall be binding upon the Purchaser, his (its) successors and assigns in the manner and for the period, and may be accepted by the Seller, all as set forth in the General Conditions and the Invitation to Bid.

5. The Government reserves the right as its interest may require, to reject all bids and to waive informalities in bidding. Awards to bidders making alternate choices may be made in the Government's interest.

By A. E. SHERMAN for
CENTURY INVESTMENT
CORP.,

/s/ A. E. SHERMAN,
Purchaser, 1101 Stewart St.,
Seattle, Wash.

Witness:

.....,

R. F. EDMONDSON,
5633 42nd S. W.,
Seattle, Wash.

Accepted by the Government as to the following disposal units subject to the General Conditions:

Disposal Unit No.: 101 thru 110, inclusive.

Building No.:

Address:

Price Bid: $23,364.00.

PUBLIC HOUSING ADMINISTRATION,

By /s/ E. STANTON FOSTER,
Deputy Director, San Francisco Field Office.

/s/ MARIE GRAHAM,
Attesting Officer.

Date: July 14, 1953.

EXHIBIT "C"

Attachment A

Duwamish Bend Apartments, Wash-45302

(All buildings are 1-story)

Sales Unit Number	Street Address	No. of Dwelling Buildings	No. of Dwelling Units	Price Bid
101	6511-5th Ave. South	2	12	$ 2,112.00
102	6500 Maynard Avenue	2	12	1,932.00
103	6528-6th Ave South	2	12	1,932.00
104	6542-6th Ave. South	3	18	2,898.00
105	6361 Maynard Avenue	2	12	1,932.00
106	6702 Maynard Avenue	2	12	1,932.00
107	6701 Maynard Avenue	3	18	2,898.00
108	525 River Street	2	12	1,932.00
109	530 Potlatch Court	3	18	2,898.00
110	500 Potlatch Court	3	18	2,898.00
				$23,364.00
	5 & 2% of bid.....			767.28

[Endorsed]: Filed October 4, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS PLAINTIFF'S COMPLAINT BY DEFENDANTS ARTHUR G. BARNETT AND VIRGINIA D. BARNETT, HIS WIFE, AND DONALD F. OWENS AND JANE DOE OWENS, HIS WIFE

Come now the defendants, Arthur G. Barnett and Virginia D. Barnett, his wife, and Donald F. Owens and Jean Owens, his wife, and move the Court for an order dismissing the complaint of the plaintiff as to these defendants on the ground and

for the reason that said complaint fails to state a claim upon which relief can be granted against these defendants.

Dated this 26th day of October, 1954.

ALEC DUFF, and
ARTHUR G. BARNETT,

By /s/ ALEC DUFF,
Attorneys for Said Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 26, 1954.

[Title of District Court and Cause.]

MOTION OF DEFENDANTS ESTER TO DISMISS

Come Now defendants Edward R. Ester and wife and move the court to dismiss plaintiff's complaint in the above-entitled action on the ground and for the reason that the same fails to state a claim upon which the relief prayed for therein can be granted as against these defendants.

ROBBINS & ROBBINS,

/s/ MORRIS A. ROBBINS,
Attorneys for Defendants Ester.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 29, 1954.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS ESTER

Come Now the defendants Edward R. Ester and wife and answering plaintiff's Complaint herein, deny, admit and allege as follows:

I.

These defendants admit paragraph I of said Complaint.

II.

Answering paragraph II, these defendants were not parties to the contract therein referred to and have no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and, therefore, deny the same on information and belief.

III.

Answering paragraph III, these defendants have no knowledge or information concerning Exhibit C referred to in said paragraph, sufficient to form a belief regarding the provisions in said paragraph set forth and, therefore, deny said paragraph on information and belief.

IV.

Answering paragraph IV, these defendants were not parties to the contract referred to in said paragraph and have no knowledge or information as to any provisions therein relating to removal of temporary buildings and, therefore, deny the same on

information and belief. These defendants admit the remainder of said paragraph IV.

V.

Answering paragraph V, these defendants have never seen the bond referred to in said paragraph and have no knowledge or information concerning its contents and provisions and, therefore, deny the same on information and belief.

VI.

Answering paragraph VI, these defendants admit that they purchased Building #105 and are renting the same but deny that the same was purchased from the Century Investment Corporation, and deny the remainder of said paragraph, and especially deny that they are acting in violation of any contract or any law.

VII.

These defendants deny paragraph VII.

VIII.

Answering paragraph VIII, these defendants deny the same and each and every allegation, matter or thing therein contained insofar as said paragraph applies to these defendants.

IX.

These defendants deny paragraph IX of said Complaint.

First Defense

That no privity of contract exists between these defendants and the plaintiff and that these defend-

ants are under no contractual obligation to remove the housing purchased by them as hereinafter more particularly alleged.

Second Defense

These defendants are not under any legal obligation by virtue of any statute, ruling or otherwise, to remove the housing purchased by them.

Third Defense

That as hereinafter more particularly alleged, Building #105, owned by them, is not temporary in nature and not within the purview of the Lanham Act or subject to any of its provisions.

Fourth Defense

That the removal of Building #105, owned by these defendants, is not in the public interest.

Fifth Defense

That to compel these defendants to remove Building #105 would be inequitable, unjust, oppressive and would deprive these defendants of their property and property rights without due process of law and in violation of their constitutional rights.

Sixth Defense

That these defendants have in good faith expended large sums of money in improving said Building #105 and in converting the same from temporary into permanent housing, and for the

purchase of the land on which said housing is situated, and that the removal of said housing would cause these defendants grave financial loss and that such removal is of no benefit or advantage to the plaintiff and that the plaintiff would suffer no damage whatever if said building is not removed from its present site.

First Affirmative Defense

By way of first affirmative defense these defendants allege: That on or about June, 1953, the Public Housing Administrator acting in behalf of plaintiff, sold and conveyed the houses described in plaintiff's Complaint to the Century Investment Corporation and vested said purchaser with full power and authority to resell said housing, or any portion thereof, to third party purchasers and to vest such purchaser with full legal title to said housing. That thereafter said Century Investment Corporation sold Building #105 to one Carl W. Pague. That in November, 1953, the said Carl W. Pague sold and delivered Building #105 to these defendants for a valuable consideration. That before purchasing the said building these defendants inquired as to their right to keep said building on site and rent the same. That one, Virgil J. Pague, who these defendants believe was the president of Century Investment Corporation, stated and represented to these defendants that it was lawful and proper to keep and use said Building #105 on site provided that said building was remodelled and renovated in com-

pliance with the Building Code requirements of the City of Seattle. Said Pague further stated and represented that the purchaser, the Century Investment Corporation, had been renting other buildings which were part of said housing project on site for a number of months with the full knowledge, permission and acquiescence of the Public Housing Administrator. That said Pague suggested to these defendants that they contact the Housing Authority of the City of Seattle, which was in charge of said housing project, for verification of his statements and representations. That acting upon said suggestion, these defendants contacted the Housing Authority of the City of Seattle and were assured by one Michaelson, the apparent head of the Housing Authority of the City of Seattle, which had charge and control of said housing project, that these defendants could lawfully rent Building #105 on site and that it would not be necessary to remove the same, providing that these defendants complied with the Building Code of the City of Seattle.

That relying upon the statements and representations aforesaid, and upon the fact that the Century Investment Corporation had been renting houses on site without interference or action by plaintiff and with the plaintiff's apparent permission and consent, for a number of months, and upon the assurance of the authorized and constituted agency in charge of said housing project that it would not be necessary to remove said building provided it

was renovated and remodelled in accordance with the requirements of the Building Department of the City of Seattle, these defendants did, for value, and in good faith, and without any knowledge to the contrary, purchase the said Building #105 from said Carl W. Pague and did purchase and acquire the land upon which said building was situated. That in further reliance thereon, these defendants did remodel, renovate and improve said Building #105 under proper permits from the Building Department of the City of Seattle. That they removed the old plumbing and replaced the same with entirely new plumbing. That they renovated the heating plant, installed new oil burners and storage tanks; placed siding on the exterior, installed coverings for porches, reinforced the foundation, renovated and rebuilt the kitchens, installed new gas ranges and new refrigerators and did other work required by the Seattle Building Department in order to convert said temporary housing into permanent housing complying with the Building Code of said City. That these defendants expended in excess of $16,000.00 in the acquisition of said building, land and improvements. That all of said expenditures were made in good faith and in the honest belief that their actions were lawful and in reliance upon the aforementioned statements and representations, and upon the apparent authority conferred by plaintiff upon the Century Investment Corporation. That these defendants were led to believe by the fact that their vendors were renting other buildings on site without mole-

station or interference by the plaintiff that it was lawful so to do, and that plaintiff did not deem it in the public interest to remove such buildings and had waived its requirement for their removal. That by reason of the aforesaid acts and conduct of the plaintiff and its agents and representatives, plaintiff has either waived, or is now estopped from asserting, any right or claim for the removal of Building #105 owned by these defendants.

Second Affirmative Defense

By way of second affirmative defense these defendants allege: That the Judgment in the condemnation proceeding granted plaintiff the right to lease the lands described in plaintiff's Complaint including the land now owned by these defendants on a year to year basis commencing February 21st. That in order to renew said lease from year to year plaintiff was required to obtain the consent of the landowners and to pay or tender rental specified in the Judgment in said condemnation proceeding before the commencement of the next rental year. That plaintiff failed to obtain the consent of these defendants to renew its lease on the land on which Building #105 is situated, or to pay or tender the rental therefor, prior to February 21, 1954. That by reason of such failure, the plaintiff has either abandoned said lease or waived or lost its right to renew the same. That since February 21, 1954, plaintiff has not had and does not now have any right to the use of the land owned by these defendants on

which Building #105 is situated, and no right or title whatever in said land or said building, and is now without legal right to enter upon said land for any purpose whatsoever without order of this Court or consent of these defendants.

Cross-Claim

By way of cross-claim against plaintiff, these defendants allege:

I.

These defendants reallege their First Affirmative Defense and Second Affirmative Defense hereof and by reference incorporate the same herein and make the same a part of this cross-claim as though fully set forth herein.

II.

That these defendants are the owners and entitled to possession of Building #105, located at 2361 Maynard Avenue, Seattle, Washington, and Lots 21, 22, 23 and parts of Lot 19, and have a legal right of possession to Lots 19 and 20, all in Block 11, McLaughlin's Waterfront Addition to the City of Seattle, King County, Washington. That plaintiff does not have and is not entitled to assert any right, title or interest in said building or said real property, and is not entitled to the possession or use of either. That these defendants are entitled to a judgment and decree of this Court adjudging them to be the absolute owners and entitled to exclusive possession and use of said building and lands and quieting their title and right of exclusive possession

and use of same and removing the alleged claim of plaintiff herein as a cloud upon these defendants' said title and exclusive use and possession of said building and lands.

Wherefore, these answering defendants pray for judgment and decree of this Court as follows:

1. Dismissing plaintiff's Complaint herein with prejudice and adjudging that plaintiff take nothing by virtue of same.

2. Confirming their title and exclusive right of possession and use of said Building #105 and the lands on which the same is situated as hereinabove described, and removing the plaintiff's claim as a cloud upon these defendants' said title.

3. Costs and disbursements herein incurred.

4. For such other and further relief as the Court may deem just and equitable in the premises.

/s/ MORRIS A. ROBBINS,
Attorney for Defendants
Ester.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 12, 1954.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS PAGUE

Defendants Virgil J. Pague and Carl W. Pague and Jane Doe Pague, his wife, answer the Complaint herein as follows:

I.

Answering Paragraph II, these defendants deny that Virgil J. Pague entered into any contract in writing with the Director of the Public Housing Administration, as therein alleged, or that he assumed any obligation to carry out the terms of said alleged contract.

II.

Answering Paragraph VI, these defendants admit that Virgil J. Pague has acquired from Century Investment Corporation certain of the buildings mentioned in said Complaint and is now the legal owner thereof, and to the best of the knowledge and belief of these defendants, Arthur G. Barnett, Donald F. Owens and Edward R. Ester are the owners of other such buildings. These defendants deny that the buildings are temporary and admit that Virgil J. Pague has rented certain apartments therein, but deny that they have violated in any way any contract to which they are parties. Except as specifically admitted herein, these defendants deny each and every allegation of Paragraph VI.

III.

These defendants deny each and every allegation in Paragraph VIII and IX of the Complaint.

For a Further and First Affirmative Defense, These Defendants Allege:

I.

Defendant Virgil J. Pague is the owner of and entitled to the possession of the land upon which Building 102 stands, and said defendant is the lessee and the person entitled to the possession of the land upon which Building 103 stands. Said buildings have been modified so that they are not temporary buildings, and meet all requirements of the Building Codes of the City of Seattle and the zoning ordinances thereof, and are in every respect suitable buildings to be upon the land where they now stand. Said buildings are vitally needed for public housing and approval has been obtained of the City of Seattle for them to be located in the future upon the land where they now stand.

II.

Any interest of the plaintiff in the land where said buildings now stand either has terminated or will terminate shortly, and the owners of said land will not hold plaintiff to any obligation to remove said buildings therefrom and plaintiff will suffer no damage if said buildings remain upon the sites where they are now located.

III.

Upon the expiration of plaintiff's lease upon the sites where the buildings now stand, which will occur shortly if it has not already occurred, defendants will have a legal right to maintain said buildings thereon and to replace the same there if they

be now moved therefrom, and no good or equitable purpose can be served by requiring the removal of said buildings at this time.

For a Further and Second Affirmative Defense, These Defendants Allege:

I.

The tenure of plaintiff to the land upon which the buildings referred to in the complaint stand has expired and plaintiff now wrongfully asserts the right to possession of said land and said assertion constitutes a cloud upon the title of these and other defendants herein who are the rightful owners and/or persons entitled to possession of both said land and said houses.

Wherefore, these defendants pray that the prayer of the complaint be denied and that the court quiet the title in these defendants to buildings 102 and 103 and the lands upon which they stand against any claims of plaintiff to any tenure or right to possession thereof, and that these defendants have such other and further relief as to the court shall seem equitable.

LYCETTE, DIAMOND & SYLVESTER,

By /s/ LYLE L. IVERSEN,
Attorneys for Defendants Pauge.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 12, 1954.

[Title of District Court and Cause.]

ANSWER OF CENTURY INVESTMENT CORPORATION

Century Investment Corporation answers the Complaint herein as follows:

I.

Answering Paragraph II, this defendant admits that it entered into a contract on or about July 14, 1953, with the Director of Public Housing for the purchase of certain housing units as set out in Exhibit "C" attached to the complaint. Except as specifically admitted herein, this defendant denies every allegation in Paragraph II of the complaint.

II.

Answering Paragraph IV of the complaint, this defendant admits that the date of November 2, 1953, was originally set for completion of the removal of the buildings, but alleges that said date was extended and this defendant was led to believe by authorized agents of the government that certain buildings which might be made to conform to the requirements of the Building Code of the City of Seattle might be allowed to remain in place as permanent type buildings; and in reliance thereon this defendant sold buildings 102, 103, 104 and 105 to other parties without removing the same from the locations upon which they stood, and said buildings have been so modified as to meet all the requirements of the City of Seattle and said structures are

no longer temporary buildings. This defendant admits that said buildings now stand upon the lots alleged in Paragraph IV. Except as admitted herein, the allegations of Paragraph IV are denied.

III.

Answering Paragraph VI of the complaint, this defendant admits that Virgil J. Pague purchased from it buildings 102 and 103, and denies every other allegation of Paragraph VI.

IV.

This defendant denies each and every allegation of Paragraphs VIII and IX of the complaint.

For a Further and Affirmative Defense, This Defendant Alleges:

I.

Each of the buildings now standing upon its original site has been so modified that the same is not a temporary building, and each of said buildings meets all requirements of the Building Code of the City of Seattle and the zoning ordinances thereof, and is in every respect suitable to be upon the land where it now stands. Said buildings are vitally needed for public housing and approval has been obtained from the City of Seattle for them to be located in the future upon the land where they now stand.

II.

Any interest of plaintiff in the land where said buildings now stand either has terminated or will

terminate shortly, and the owners of said land will not hold plaintiff to any obligation to remove said buildings therefrom and plaintiff will suffer no damage if said buildings remain upon the sites where they are now located.

III.

Upon the expiration of plaintiff's lease upon the sites where the buildings now stand, which will occur shortly if it has not already occurred, the owners of said buildings will have a legal right to maintain said buildings thereon and to replace the same there if they be now removed therefrom, and no good or equitable purpose can be served by requiring the removal of said buildings at this time. The owner of each of said houses is also the owner or lessee and the person entitled to possession of the land upon which the same now stands.

Wherefore, this defendant prays that the complaint be dismissed as to it.

LYCETTE, DIAMOND & SYLVESTER,
Attorneys for Defendant Century Investment Company,

By /s/ LYLE L. IVERSEN.

Receipt of copy acknowledged.

[Endorsed]: Filed November 12, 1954.

[Title of District Court and Cause.]

ANSWER, DEFENSES AND AFFIRMATIVE DEFENSES BY DEFENDANTS DONALD F. OWENS AND JEAN OWENS, His Wife, AND ARTHUR G. BARNETT AND VIRGINIA D. BARNETT, HIS WIFE

Come now the above-named defendants, Donald F. Owens and Jean Owens, his wife and Arthur G. Barnett and Virginia D. Barnett, his wife, and by way of answer to the complaint of the plaintiff allege as follows:

I.

Answering paragraph II of plaintiff's complaint, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

II.

Answering paragraph III of said complaint, these defendants allege that the exhibits referred to therein and from which quotations are taken, speak for themselves.

III.

Answering paragraph IV of said complaint, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof; that these defendants admit the allegations in said paragraph as set forth on page 3 of plaintiff's complaint beginning line 10 and line 11 as to a portion of Building 104, as to the location thereof.

IV.

Answering paragraph V of plaintiff's complaint, admit the same.

V.

Answering paragraph VI of plaintiff's complaint as it pertains to these defendants admit that these defendants purchased Building 104, and admit that these defendants have rented apartments in said Building 104, and deny all the other remaining allegations in said paragraph VI, and specifically deny that they purchased from Century Investment Corporation, and deny that Building 104 is temporary.

VI.

Answering paragraph VII of plaintiff's complaint, these defendants deny the same excepting that as to these defendants the said A. E. Sherman asserts an adverse claim in the form of a lien filed by the said A. E. Sherman against Building 104.

VII.

Answering paragraph VIII of plaintiff's complaint, these defendants deny the same.

VIII.

Answering paragraph IX of plaintiff's complaint these defendants deny the same insofar as these defendants are referred to therein.

First Defense

The complaint fails to state a claim against the defendants, Donald F. Owens and Jean Owens, his

wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, upon which relief may be granted.

Second Defense

That the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, are not parties to the contract for the violation of which damages are sought by the plaintiff.

Third Defense

That the laws of the United States relate to temporary housing whereas Building 104, now owned by the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, and which was formerly temporary and subject to condemnation under the laws of the City of Seattle, has been changed and is now permanent housing in compliance with the codes of the City of Seattle governing the occupancy of dwellings by human beings; that whereas removal of temporary housing is declared in the laws of the United States to be in the public interest, the removal of permanent housing is not in the public interest.

Fourth Defense

That plaintiff has abandoned its use of the land upon which Building 104 is situate, legally described as follows:

The South ½ of Lot 12 and Lots 13, 14, 15, 16, 17, 18, 19 and 20, Block 11, Joseph R. Mc-

Laughlin's Water Front Addition to the City of Seattle, according to plat thereof, Recorded in Volume 13 of Plats, page 28, records of King County, King County, Washington.

that these defendants are the owners of said land, having paid $17,484.91 for the purchase thereof, a portion of the same being bought under a contract for the sale of real estate on which there is an approximate balance now due of $4,300.00; that the said land was condemned along with other parcels for emergency housing and said emergency has long ceased to exist, and plaintiff has already released other portions of said lands and is, without good reason in law or in equity, attempting to renew its lease of the lands now owned by these defendants; that the sole reason for the plaintiff's renewals or attempted renewals under the facts as set forth in the affirmative defenses of the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, which by this reference are incorporated herein as though fully set forth, is to clear the land owned by these defendants of "temporary" housing and return it to these defendants in such a condition so that the plaintiff will not be subject to an action for damages by these defendants; that plaintiff has attempted to renew said leases from time to time in a manner not authorized by law.

Fifth Defense

That plaintiff is attempting to deprive these defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, of their property without due process of law.

First Affirmative Defense

These defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, allege that during the latter part of November, 1953, they were advised that buildings 102 and 103, also involved in this suit, were occupied by tenants and that the City of Seattle had allowed occupancy of these buildings by human beings after compliance with Seattle building codes, and that the plaintiff has advised that if title to the lands and the units situate thereon became merged and the buildings made to comply with the building codes of the City of Seattle, that the same would constitute a removal under the laws of the United States; that with reference to Building 104, the defendant, Arthur G. Barnett, was advised by plaintiff's agents that if the land and Building 104 located thereon were owned by one party and changes made to comply with the building codes of the City of Seattle, the same would constitute "a removal" under the laws of the United States, but that adequate proof thereof should be forwarded to the plaintiff; that relying on plaintiff's conduct and advice the defendants, Donald

F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, consummated purchase of a portion of Building 104 from R. M. Scougal and F. T. Crow for the sum of $1,715.09 and the remaining portion of Building 104 from Virgil J. Pague for the sum of $4,695.00. The original cost of said Building 104 as shown in plaintiff's Exhibit C-2 is the sum of $2,898.00. These defendants participated in no portion of the profit made from said sale by the defendants, Century Investment Corporation or any of its vendees.

Relying on the two Warranty Bills of Sale obtained from vendors, and having already purchased the land, as set forth hereinabove in paragraph Fourth Defense, these defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, expended approximately $17,337.14 in addition to the purchase price of the buildings, to comply with the building codes of the City of Seattle, excepting for approximately $3,100.00 for the purchase and installation of gas stoves, meters and new Westinghouse refrigerators; that additional work is needed on the heating plant and at the time of the trial of this action the final cost thereof will be submitted in evidence; that according to estimates given to these defendants, it will cost approximately $4,600.00 to cut up and move Building 104 and to return said building back to the land owned by these defendants; that it would be a useless act to thus compel the defendants, Donald F. Owens and Jean Owens,

his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, to move said units only long enough to allow the plaintiff to return the land to these defendants, thus enabling these defendants to move said building back onto their land; furthermore, it would be a useless expense, not favored in equity, to pay the costs of moving said Building 104 back and forth, together with the costs of disconnecting and reconnecting the gas mains, hundreds of feet of which were installed by the Seattle Gas Company to reach the building belonging to these defendants and the defendants Ester, and to disconnect and reconnect electric wiring, plumbing, sewers, etc.; that these acts would not be in the public interest; that the damage and losses to the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, would be enormous, while the alleged damage to the plaintiff would be minor, if at all.

That the yearly rental which the plaintiff alleges as damages for the year beginning February 21, 1954, because plaintiff has been forced to renew its use of the lands amounts to the sum of $159.00 per year for lands owned by the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, of which sum $117.00 is still in the possession of the plaintiff and has not been paid to or tendered to these defendants; that these defendants waive any right to said rent and will stipulate to return to

plaintiff the amount of rent paid and will waive said $117.00 and will stipulate to the return of the land and acceptance of the same in its present condition and to hold plaintiff harmless; that plaintiff has released other lands involved herein upon waiver of rent and reimbursement of rent and acceptance of the land in its condition and without liability running against the plaintiff.

Second Affirmative Defense

These defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, allege all of the matters set forth in the First Affirmative Defense and by reason of the matters set forth therein allege that the plaintiff is estopped to deny its opinions, advice and actions therein stated and relied upon by these defendants.

Third Affirmative Defense

These defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, based on the facts related in the First Affirmative Defense, which is realleged herein, allege that the plaintiff, by its laches and course of conduct, entrapped these defendants, and plaintiff is thereby foreclosed in law and in equity from the relief which it seeks; further in this respect, these defendants allege that it is common knowledge, of which the Court will take judicial notice, that similar units to those contained

in Building 104 have been sold and placed on other locations in the City of Seattle and changed to comply with the building codes of the City of Seattle, and that there was therefore good reason in fact or in law or in equity for these defendants to believe and rely upon the opinions, advice and conduct of the plaintiff that the changes made would constitute a technical removal.

Fourth Affirmative Defense

These defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, reallege their First Affirmative Defense and based on the facts therein stated allege that plaintiff has waived any rights it may have possessed against the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife. The plaintiff has further waived any rights it may have possessed for the reason that plaintiff, knowing of the plans and of the work done and of the purchases of Building 104 and the land thereunder by these defendants, and the fact that these defendants were relying on the representations of plaintiff's agents and were acting in reliance thereon, permitted these defendants to continue their course of conduct in making the purchases and changes referred to herein.

Wherefore, the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, pray that the prayer

of the plaintiff be denied as to these defendants, excepting plaintiff's prayer for such other and further relief as to the Court may seem just and equitable, and that the Court assess any damages found to be due the plaintiff against the parties privity to the contract with the plaintiff.

ALEC DUFF, and
ARTHUR G. BARNETT,
Attorneys for the Defendants, Donald F. Owens and Jean Owens, His Wife; and Arthur G. Barnett and Virginia D. Barnett, His Wife.

By /s/ ALEC DUFF.

Receipt of copy acknowledged.

[Endorsed]: Filed November 12, 1954.

[Title of District Court and Cause.]

ORDER DISCHARGING RULE TO SHOW CAUSE AND DENYING MOTIONS TO DISMISS

An order to show cause having heretofore been issued by this Court citing the defendants to appear on the 5th day of November, 1954, at 2:00 o'clock p.m. and show cause why they should not be required to remove certain buildings described in the complaint, and to do certain other things mentioned in said order to show cause, and the defendants having made return to said order to show cause

and the defendants having separately moved to dismiss the complaint and said order to show cause having regularly come on for hearing at the time stated, and said motions to dismiss having been noted for said time, and all the parties, plaintiff and defendant, having been represented by counsel, and the Court having heard the arguments and having considered the affidavits in support and in opposition to the rule to show cause, and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed:

1. That plaintiff take nothing under the order to show cause and that the rule be discharged.

2. That the motions to dismiss, made separately by the defendants, be and they are hereby each denied.

3. Defendants shall have until Friday, November 12, 1954, to answer the complaint.

Done in Open Court this 16th day of November, 1954.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

LYCETTE, DIAMOND & SYLVESTER,
Attorneys for Defendants Pague;

By /s/ LYLE L. IVERSEN.

Approved as to form and Notice of Presentation waived:

/s/ ALEC DUFF,
Attorney for Arthur G. Barnett et ux., and Donald P. Owens, et ux., Defendants.

/s/ MALCOLM McLEOD,
Attorney for Hartford Accident & Indemnity Co. and A. E. Sherman.

/s/ GERALD SHUCKLIN,
Attorney for Defendant Geneva L. Pague.

Approved for entry and Notice of Presentation waived:

/s/ MORRIS A. ROBBINS,
Attorney for Defendants Ester.

Approved as to form:

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ JOHN A. ROBERTS, JR.,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed November 16, 1954.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Defendant, Century Investment Corporation, requests plaintiff, within ten days after service of this request, to make the following admissions for the purpose of this action only, pursuant to Rule 36 of the Rules of Civil Procedure:

1. That the document attached hereto, headed "Resolution No. 16729" is a true copy of a resolution passed by the Council of the City of Seattle on the 13th day of September, 1954, and that the same is on file with the Comptroller and Clerk of the City of Seattle and has not been rescinded or modified by the Council of the City of Seattle, and further, that a certified copy of said resolution was transmitted by the City Clerk of the City of Seattle to the San Francisco Field Office of the Federal Public Housing Administration.

2. That the document attached hereto, headed "Re: Cancellation of permit for use and occupancy of street area" is a true copy of a letter transmitted by the Board of Public Works of the City of Seattle to the Federal Agency shown thereon, and that the same was duly received on a date shortly after that, which the document bears.

3. That the action of the Board of Public Works of the City of Seattle as related in the attached letter, headed "Cancellation of permit for use and occupancy of street area" is correctly stated in

said document, and that said action did take place.

4. That Virgil J. Pague is the owner of the land upon which building 102 stands.

5. That defendant Virgil J. Pague owns or has under lease from the owner thereof, the land upon which Building 103 stands.

6. That on or about the 5th day of January, 1955, defendant Virgil J. Pague served upon the United States District Attorney and filed in Cause No. 1143, a document in accordance with the copy thereof attached hereto, headed "Notice of Refusal to Renew."

LYCETTE, DIAMOND & SYLVESTER,

Attorneys for Defendant, Century Investment Corporation,

By /s/ LYLE L. IVERSEN.

Resolution No. 16729

A Resolution approving the long term use on the site of certain renovated temporary family dwelling units in Block 11, J. R. McLaughlin's Waterfront Addition for rental purposes; and making a recommendation to the Public Housing Authority in connection therewith.

Whereas, the petitioners mentioned in Comptroller's File No. 225125 state that they have purchased and have renovated certain temporary family

dwelling units which the Public Housing Administration has sold for removal from the site; and

Whereas, said petitioners have requested the City Council to recommend the on-site sale to them of said units by the Public Housing Administration for long term use by the petitioners for rental purposes; and

Whereas, the City Council deems such use to be consistent with the public interest in this instance;

Now, therefore,

Be It Resolved by the City Council of the City of Seattle:

That certain temporary family dwelling units in Block 11, J. R. McLaughlin's Waterfront Addition which have been purchased and renovated by the petitioners mentioned in Comptroller's File No. 225125, are hereby approved for use on the site for rental purposes, for a period of five years from October 1, 1953; and the City Clerk is hereby authorized and directed to so advise the Public Housing Administration, San Francisco Field Office, 1360 Mission Street, San Francisco 3, California, by transmitting a certified copy of this resolution to said agency with the recommendation, which is hereby incorporated in this resolution, that said agency waive its requirement for the removal of such units from the site and permit the on-site sale thereof for such use to the petitioners, to wit: Arthur G. Barnett and Associates, 1304 Northern Life Tower, Seattle 1, Washington.

Passed the City Council the 13th day of September, 1954, and signed by me in open session in authentication of its passage this 13th day of September, 1954.

/s/ M. B. MITCHELL,
President of the City Council.

Filed by me this 13th day of September, 1954.
Attest:

/s/ N. C. THOMAS,
City Comptroller and City Clerk.

By /s/ W. A. PENNE,
Deputy.

State of Washington,
County of King,
City of Seattle—ss.

I, W. C. Thomas, Comptroller and City Clerk of the City of Seattle, do hereby certify that the withm and foregoing is a true and correct copy of Resolution No. 16729 of the City Council of the City of Seattle, being

A Resolution approving the long-term use of the site of certain renovated temporary family dwelling units in Block 11, J. R. McLaughlin's Waterfront Addition, for rental purposes; and making a recommendation to the Public Housing Administration in connection therewith as the same appears on file, and of record in this Department.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the City of Seattle, this 14th day of September, 1954.

[Seal] W. C. THOMAS,
Comptroller and City Clerk,

By /s/ C. G. ERLANDSON.

October 28, 1953.

Registered

Re: Cancellation of permit for use and occupancy of street area.

Federal Public Housing Authority,
Mr. John Melville,
Director of the San Francisco Field Office,
1360 Mission Street,
San Francisco, California.

Dear Sir:

It has been brought to the attention of the Board of Public Works that the housing project in the vicinity of 6th South and Michigan Street is being dismantled and the property being cleared of all structures. The Board of Public Works, City of Seattle permit, A 5575, covers the use and occupancy of certain streets and alleys in this area upon which buildings in this project were located.

The Board of Public Works in regular session today, in view of this development, took action to

cancel permit A 5575 and in accordance therewith you are herewith notified that all buildings and appurtenances occupying the streets and alleys covered in the above permit must be removed and the property restored to its original condition within 30 days from the date of this notice.

By order of the Board of Public Works in regular session October 28, 1953.

Respectfully yours,

BOARD OF PUBLIC WORKS,

E. G. HENRY,
Executive Secretary.

sb
cc: Mr. Matson

[Title of District Court and Cause.]

NOTICE OF REFUSAL TO RENEW

To the above-named Petitioner, and to Charles P. Moriarty and Richard D. Harris, its Attorneys:

Virgil J. Pague hereby gives notice that he does not consent to the renewal of the lease of the above-named Petitioner as to Parcels 1 to 11 for the period beginning February 21, 1955, and further, that he does not recognize that the Petitioner has any tenancy at this time in said property or any right to renewal.

Dated at Seattle, Washington, this 5th day of January, 1955.

LYCETTE, DIAMOND & SYLVESTER,

By LYLE L. IVERSEN,
Attorneys for Virgil J. Pague.

Receipt of copy acknowledged.

[Endorsed]: Filed May 24, 1955.

[Title of District Court and Cause.]

OBJECTIONS BY DEFENDANTS PAGUE AND CENTURY INVESTMENT CORPORATION TO GOVERNMENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants Pague and Century Investment Corporation object to the draft of findings and conclusions proposed by the government on the following grounds:

1. The draft was not served upon counsel for these defendants in time to permit them five days for making objections and proposing alternate findings as provided in Rule 26 of the local rules of the United States District Court for the Western District of Washington.

2. Paragraph IV of the proposed findings is not supported by any evidence.

3. The findings are incomplete in that they fail to include the following important factual elements:

(a) The real estate underlying Buildings 102 and 103 is owned by defendant, Virgil J. Pague, and the real estate underlying Buildings 104 and 105 is owned by the other defendants herein, respectively.

(b) The right of the government to the use of the street areas underlying said buildings has been revoked and said permission is vested in defendants by the City of Seattle.

(c) Louis J. Michaelson acted as the contact for plaintiff in all dealings with purchasers of housing in the project designated, Wash-45302.

(d) Louis J. Michaelson led defendants to believe that approval would be forthcoming for leaving the buildings on site if brought up to city codes and acquiesced in and encouraged defendants to expend large sums of money in remodeling said buildings to bring them up to city codes.

(e) Louis J. Michaelson was vested with apparent authority to deal on behalf of plaintiff in all matters respecting the administration and interpretation of the contract of sale of the buildings in question.

(f) Buildings 102 and 103 were purchased by and are the property of Virgil J. Pague.

(g) Defendants have declined to recognize the right of the government to renew its lease and have

failed and refuse to accept any rental payment therefor.

(h) That at the conclusion of the trial of this cause upon motion of defendants' counsel, Jane Doe Pague, former wife of Virgil Pague, was dismissed as a defendant.

4. Paragraph XII of the proposed findings misstates the order of the court in that it undertakes to specify the emergency as that declared by the President of the United States whereas said order does not make any such statement.

5. The proposed findings are deficient in that they fail to include the fact that the government did not establish any monetary damages.

6. Paragraph IV of the Conclusions of Law is erroneous in reciting that in entering into the contract, the plaintiff's agency, the Public Housing Administration, was complying with the mandatory requirements of Section 313 of the Lanham Act.

7. The proposed findings in paragraph VIII of the Conclusions of Law are erroneous in that they state entirely wrong and illegal conclusions and undertake to change the contract from that entered into by the parties.

8. Conclusions of Law IX is improper in that it undertakes to require specific performance against persons who are not parties to a contract. It is further wrong in that it is based upon improper concepts of law.

9. Paragraph X of the Conclusions of Law is improper in concluding that the plaintiff had exclusive use of the real estate underlying the buildings involved in this action since said possession was lost both legally and physically by the plaintiff.

10. Paragraph XI of the proposed Conclusions of Law is improper in that it undertakes to find, contrary to the evidence, that the plaintiff has been damaged and calls for an accounting without any designation of the method of accounting and without any legal basis for an accounting.

11. Paragraph XII of the proposed Conclusions of Law is erroneous in that it denies relief to which the defendants are entitled under the law.

LYCETTE, DIAMOND & SYLVESTER,

Attorneys for Defendants Century Investment Corporation and Defendants Pague.

By /s/ LYLE L. IVERSEN.

Receipt of copy acknowledged.

[Endorsed]: Filed October 12, 1955.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

IX.

From the time that the respective defendants acquired land upon which the buildings in question stood, they have declined to consent to any renewals of the lease of the Government to the real estate,

and have declined to accept any rent therefore and any amounts which have been paid by the Government into court on account of said rentals still remain in the hands of the clerk; that there is no proof that said payments to the clerk include the full amount of the specified rental including particularly payment of taxes.

* * *

Presented by:

ARTHUR G. BARNETT, and
ALEC DUFF,
Attorneys for Arthur G. Barnett and Donald F. Owens, and
MORRIS ROBBINS,
Attorney for Edward R. Ester.

The foregoing forms of findings of fact and conclusions of law were by counsel presented to the undersigned trial judge with a request that the Court sign and enter them on October 20, 1955, which request was on said date respectfully denied.

/s/ JOHN C. BOWEN,
Judge.

Receipt of copy acknowledged.

Lodged October 19, 1955.

Rejected, endorsed and filed October 20, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for trial before the undersigned judge of the above-entitled court on the 7th day of September, 1955, on the Complaint of the plaintiff, as amended, and the answers thereto and cross-complaints of the respective defendants above named, and the plaintiff, United States of America, being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington, and John A. Roberts, Jr., Assistant United States Attorney for said district, and the said defendants and all of them, having each appeared by their respective counsel of record herein, and witnesses having been sworn, testimony taken, and evidence adduced, and the trial having continued from day to day until September 17, 1955, and the court having considered the evidence introduced by the parties hereto, the arguments and briefs of counsel, the pleadings and all other matters of record herein, and being fully advised in the premises, now makes the following:

Findings of Fact

I.

That prior to June 22, 1953, the Administrator of the Public Housing Administration, an agency of the Housing and Home Finance Agency of the United States of America, plaintiff herein, through his duly authorized representatives and through the

Housing Authority of the City of Seattle, an agency of the City of Seattle, Washington, issued a general invitation to the public to submit sealed bids for the sale and removal of ten temporary war housing buildings, containing 144 dwelling units, and for the clearance of the real estate sites upon which said buildings were then located; said temporary dwelling buildings are designated by the Public Housing Administration and in said invitation to bid as buildings numbers 101 through 110 consecutively, of project Wash-45302 and are located in the City of Seattle, within the Northern Division of the Western District of Washington; that in issuing said invitation and in entering into the contract, hereinafter referred to, the Public Housing Administration was effectuating the requirements of Section 313 of the Lanham Act, hereinafter referred to.

II.

That by condemnation proceedings entitled United States v. Certain parcels of land in King County, Washington, et al., Civil No. 1143 of this court, the United States of America acquired the exclusive use of the real estate, excluding street areas of the City of Seattle, underlying said buildings 101 through 110 of project Wash-45302, under authority granted by the Lanham Act, P. L. 849, 76th Congress, as amended; 54 Stat. 1125, 42 U.S.C. 1521 et seq., for the purpose of erecting temporary war housing thereon; that following the taking of said land, temporary war housing project Wash-45302 was erected thereon by the Public Housing Administration; that

the plaintiff has continuously held the exclusive use of certain parcels of said land, hereinafter specifically ennumerated, and that the present term of such exclusive use extends to February 21, 1956; that the acts of the defendants complained of in this action are, and at all times material to this action have, interfered with the plaintiff's exclusive use of said land to the plaintiff's damage; that the Court during the trial of this cause took judicial notice of said Cause No. 1143 and all of the proceedings and files and records therein.

III.

That pursuant to said invitation, sealed bids were received, and opened by the Housing Authority, City of Seattle, on June 22, 1953; the bid of one A. E. Sherman, defendant herein, was the highest bid submitted; that said bids were forwarded to the Public Housing Administration and, thereafter that department of the plaintiff herein, advised the Housing Authority, City of Seattle that the bid of A. E. Sherman would be accepted and that the Housing Authority, City of Seattle was authorized to collect the difference between the amount of said bid and the bid deposit.

IV.

That A. E. Sherman submitted said bid under the direction, supervision and at the request of one Virgil J. Pague, defendant herein, his then employer; that the said Pague determined that said bid be submitted, the amount of said bid and supplied the money required for the bid deposit and

used the name and services of A. E. Sherman because Sherman was a man of small means while he, Pague, had substantial assets, so that in the event of any subsequent trouble concerning said buildings, the financial assets of the said Virgil J. Pague would be protected; that defendant Virgil Pague was not an original party to the contract with defendant Century but did, with Sherman's assistance, negotiate the contract.

V.

That on July 3, 1953, pursuant to notice, the balance of the purchase price due on said sale was tendered to the Housing Authority, City of Seattle at its office at 825 Yesler Street, Seattle, Washington, and in particular, to one Louis Michaelson, an employee of said organization who was the principal individual with whom the public dealt concerning the sale and removal of buildings and site clearance at project Wash-45302; that said payment was tendered by A. E. Sherman who, at said time and place advised the said Michaelson that said payment was tendered in behalf of the defendant, Century Investment Corporation, a proposed corporation and then in the preliminary stages of incorporation, and to which A. E. Sherman assigned his interest in said bid, and that the incorporators of same were Virgil J. Pague, defendant herein, and the same individual referred to in paragraph IV hereof, Albert A. Rontai and Orville Cohen; that at said time and place the contract with the plaintiff herein, was prepared in the name of Century Investment Corporation and thereafter forwarded with the balance of the pur-

chase price to the Public Housing Administration for approval and execution.

VI.

That on July 14, 1953, said contract for sale and off-site removal of temporary war housing buildings and site clearance at project Wash-45302 (attached hereto as Exhibit A and made part hereof), was executed by the Contracting Officer for the Public Housing Administration, and thereafter delivered to the Century Investment Corporation; that the details of completing incorporation were not accomplished and the articles of incorporation of the Century Investment Corporation were not filed with the Secretary of the State of Washington until July 17, 1953, but thereafter and prior to August 21, 1953, said corporation actively entered upon the work of completing said contract by retaining the said A. E. Sherman as its sales agent, selling and removing buildings and clearing the sites from which buildings were being removed.

VII.

That on July 14, 1953, a contract performance bond in the sum of $5,000.00 was executed by the Century Investment Corporation through Virgil J. Pague, its president, as principal, and the Hartford Accident and Indemnity Company, as surety, in favor of the Housing Authority, City of Seattle, to insure the contract obligation of Century Investment Corporation that it would do all the work and furnish all the materials for the removal of buildings and site clearance and faithfully perform all

the conditions of said contract relating to project Wash-45302; that said contract of bond has never been assigned to or transferred by the Housing Authority, City of Seattle to the plaintiff herein.

VIII.

That concerning the sale of project Wash-45302, the Housing Authority of the City of Seattle and Louis Michaelson, its employee, were granted the limited authority by the Public Housing Administration to attend to the administrative details of same in publishing notices of invitation to bid, and in distributing contract literature as supplied to them by the Public Housing Administration and in accepting and opening sealed bids, and in notifying the successful bidder when authorized to do so by the Public Housing Administration, and in attending to the details of the contract execution by the purchaser; that each and all of the defendants who dealt with the Housing Authority of the City of Seattle at the time said contract was made knew, and now knows, that said organization is and was a wholly different organization from that of the Public Housing Administration of the United States of America.

IX.

That on or about November 12, 1953, the time of performance of the condition of said contract that buildings be removed and sites cleared was extended by the Housing Authority, City of Seattle, on request therefor by Century Investment Corporation, to January 15, 1954; that defendant Hartford Ac-

cident and Indemnity Company received no notice of said extension or request therefor and did not approve said extension which was granted at a time when the Housing Authority, City of Seattle had knowledge that buildings numbered 102 and 103 of project Wash-45302 were being offered for rental, on site, to the public contrary to the spirit and plain meaning of said contract.

X.

That on and after August 21, 1953, defendant Century Investment Corporation purported to convey four buildings in project Wash-45302, namely buildings 102, 103, 104, and 105, comprising 54 dwelling units, without imposing the condition or obligation that they be removed from site; that all said four buildings, at the present time, are situated on the sites where they were first constructed as temporary war housing buildings by the Public Housing Administration, and are presently being used for private commercial dwelling purposes and are occupied by paying tenants.

XI.

That the owners of each of said buildings and the real properties upon which each is situated are as follows:

a. Building 102, project Wash-45302, located on a portion of a street area and on lots 2, 3, 4, 5, 6, 33 and 34 in block 11, McLaughlin's Waterfront Addition to the City of Seattle, King County, Washington, and purportedly acquired by defendants

Virgil J. Pague from Century Investment Corporation on August 21, 1953, for the sum of $1,932.00; that thereafter Virgil J. Pague acquired an interest in the lots, above described, underlying said building.

b. Building 103, project Wash-45302, located on a portion of a street area and on lots 10, 11, 12, 13, 29, 30 in block 11, McLaughlin's Waterfront Addition to the City of Seattle, King County, Washington, and purportedly acquired by defendant Virgil J. Pague from Century Investment Corporation on October 5, 1953, for the sum of $1,932.00; that thereafter Virgil J. Pague acquired an interest in the lots, above described, underlying said building.

c. Building 104, project Wash-45302, located on a portion of a street area and on lots 14, 15, 16, 17, 18, 19, 20, 22 and 23 in block 11, McLaughlin's Waterfront Addition to the City of Seattle, King County, Washington and purportedly acquired by defendants Arthur G. Barnett and wife and Donald F. Owens and wife on January 20, 1954, in two parts, to wit; one portion consisting of a laundry and service unit and one and a half dwelling units adjoining for the sum of $1,715.09, from R. M. Scougal and F. T. Crow, who acquired same from Century Investment Corporation on September 2, 1953; the remainder of said building being acquired from Virgil J. Pague and his brother, Carl W. Pague, who had acquired same from Century Investment Corporation; that Carl W. Pague possessed no real interest in said building and that de-

fendants Barnett and Owens paid Virgil J. Pague the sum of $4,698.00 for said portion of building 104; that on January 20, 1954, defendants Barnett and Owens and wives jointly acquired an interest in the lots, above described, underlying building 104.

d. Building 105, project Wash-45302, located on a portion of a street area and on lots 19, 20, 21, 22, 23 and 24 in block 11, McLaughlin's Waterfront Addition to the City of Seattle, King County, Washington, and purportedly acquired by defendants Edward R. Ester and wife in November, 1954, from Carl W. Pague for the sum of $3,590.00, who had acquired the same from Century Investment Corporation for the sum of $1,932.00; that thereafter defendant Ester acquired an interest in the lots, above described, underlying said building. In addition to said buildings, there are now located on or below the surface of the land described above certain brick, concrete blocks and piling, foundation posts and concrete entrance walks, and certain Wash-45302 electric light and power, telephone, sewer and water main line connections are now effected at points on or near the above-described lands.

XII.

That each and all of the pieces of real estate, described in paragraph XI hereof as lots located in block 11, McLaughlin's Waterfront Addition to the City of Seattle, King County, Washington, are among the parcels of real estate taken by the condemnation proceedings referred to in paragraph II hereof; that none of the defendants herein possessed

an interest in said lands at the commencement of said proceedings, they having acquired their respective interests after the date of the contract sued upon in this action; that by Declaration of Taking filed in said civil action No. 1143 on June 15, 1945, and Judgment on Declaration of Taking entered therein on June 16, 1945, and by subsequent Judgments Fixing Compensation and Directing Funds to be Paid, entered in said action, the plaintiff herein was granted the right to renew said exclusive use without the consent of the owners of said land from year to year, not to exceed three years after the termination of the National Emergency as declared by the President of the United States; which national emergency was that declared to exist by presidential proclamation of September 8, 1939 (54 Stat. 2643); that concerning the parcels of land above innumerated and upon which said buildings 102, 103, 104 and 105 are now located and have been continuously located, since they were originally constructed thereon, the plaintiff herein, has filed timely notice, yearly, of its intention to renew said exclusive use, the current use period extending to February 21, 1956.

XIII.

That defendants Arthur G. Barnett and wife and Donald F. Owens and wife admit and the evidence shows, that the acquisition of building No. 104 and the real estate upon which it was and is situated was a partnership venture between them and that Arthur G. Barnett attended to the details of the acquisition, and advised them of same; that Arthur G. Barnett

prior to said acquisition inquired of the said Louis Michaelson as to the status of said building and discussed the same with Virgil J. Pague, and other directors of Century Investment Corporation, and Edward R. Ester, and had full and complete knowledge of the contract obligation of Century Investment Corporation that said temporary dwelling building be removed from site and that he conveyed such knowledge to Donald F. Owens; that prior to said acquisition, defendants Barnett and wife and Owens and wife secured a preliminary title insurance report which indicated, as these defendants well knew, that parcels of land upon which building No. 104 was located were held for the exclusive use of the plaintiff herein.

XIV.

That prior to the acquisition of building No. 105, and the land upon which it was and is situated, defendant Edward R. Ester discussed the same with Virgil J. Pague, A. E. Sherman and with Louis Michaelson and had full and complete knowledge of the contract obligation of Century Investment Corporation that said temporary dwelling building be removed from site and that he received a preliminary title insurance report which indicated, as he well knew, that parcels of land underlying said buildings were held for the exclusive use of the plaintiff herein.

XV.

That each of the defendants herein who now assert ownership of buildings 102, 103, 104 or 105 be-

fore acquiring their respective interest and well knowing of the contract obligation of Century Investment Corporation to remove said buildings from site and well knowing that the exclusive use of the substantial portion of the land underlying said buildings was held for the exclusive use of the plaintiff, inquired of the said Louis Michaelson and endeavored to secure through him some express waiver of said contract obligation; that such a waiver was never obtained by any one or more of said defendants; that they, and each of them, after purporting to acquire their respective interests, and in an effort to secure an express waiver of said contract obligation, secured a resolution of the City of Seattle, Washington, whereby that municipality permitted said buildings to remain on site for a period of five (5) years, and by action of the Seattle Board of Public Works defendants now have, and plaintiff does not have and since Oct. 28, 1953 has not had, the use of the street area underlying said buildings, defendants having been granted said street use Dec. 9, 1953. Each of said buildings have by defendants been altered so as to comply with the City Code requirements.

XVI.

That at the conclusion of the trial of this cause and before argument, counsel for the plaintiff orally moved to dismiss from this action defendants A. E. Sherman and Jane Doe Sherman, his wife, Carl W. Pague and Jane Doe Pague, his wife, which motion was granted by the court, likewise Counsel's oral

motion to dismiss Geneva L. Pague, wife of Virgil L. Pague was granted.

Done In Open Court this 20th day of October, 1955.

/s/ JOHN C. BOWEN,
United States District Judge.

And from the foregoing Findings of Fact, the court enters the following:

Conclusions of Law

I.

That this is an equity proceeding.

II.

That the Court has jurisdiction over each and all of the defendants involved in this litigation.

III.

That the Court has jurisdiction over the subject matter of this litigation based upon Title 28, U.S.C., Section 1345 and Title 42, U.S.C., Section 1553.

IV.

That on July 14, 1953, the plaintiff herein, through the Public Housing Administration, an agency of the Housing and Home Finance Agency of the United States of America, entered into a valid contract in writing with the promoters and incorporators of the defendant, Century Investment Corporation, for the sale and removal of temporary

war housing buildings and site clearance, within a specified time, which temporary dwelling buildings are designated therein as buildings Nos. 101 through 110, Project Wash-45302; that the provisions of said contract, and all of them, and particularly those relating to removal of said buildings and site clearance, are clear, definite and unambiguous, and that said contract is fair, equal and just, not only in its terms, but in its circumstances; that in entering into said contract, the plaintiff's agency, the Public Housing Administration, was complying with the mandatory requirements of Section 313 of the Lanham Act, P.L. 849, 76th Congress, as amended (Title 42, U.S.C., Section 1553).

V.

That although the plaintiff did give to the Housing Authority, City of Seattle and Louis Michaelson, an employee of said organization, a limited, specially-appointed agency and authority to do certain specified things in connection with the letting of said contract, there never was any general agency from the plaintiff to said organization or to Mr. Michaelson with power broad enough to generally authorize said organization or Mr. Michaelson to waive any of the terms and conditions of said contract.

VI.

That after incorporation, the defendant Century Investment Corporation, by its acts and deeds, authorized and ratified each and all of the acts of its incorporators and of A. E. Sherman in entering

into said contract and is bound by each and all of the terms thereof and by each and all of the acts complained of in this action.

VII.

That after entering upon the work of completing said contract and accepting the fruits thereof, the defendant Century Investment Corporation breached the terms thereof in failing to remove buildings 102, 103, 104 and 105, and in failing to clear the sites upon which said buildings were located and in purporting to convey said buildings, on site, without any condition or obligation that they be demolished or removed from site as required by the express terms of said contract.

VIII.

That the breaches of contract by defendant Century Investment Corporation in failing to remove temporary dwelling buildings 102, 103, 104 and 105 of project Wash-45302, constitute irreparable injury to the plaintiff for which it had no adequate remedy at law because it enables the defendants who now claim ownership to operate said buildings for commercial dwelling purposes and other commercial purposes on land held in the exclusive use of the plaintiff, without its consent, and on the site where they were first constructed as temporary war housing buildings and by so doing the plaintiff is prevented from executing the mandate of Congress contained in Section 313 of the Lanham Act, P. L. 849, 16th Congress, as amended, (Title 42, U.S.C.,

Section 1553); that the plaintiff is therefore entitled to specific performance of said contract because of the extreme importance of the conditions and objects of said contract, all of which necessitate that said buildings be removed and that the contract be otherwise performed; and that this court should retain jurisdiction of this action until such buildings are removed and the sites upon which they stand are cleared as hereinafter specified.

IX.

That the defendant Hartford Accident and Indemnity Company should be dismissed from this action for the reason that the plaintiff herein was not the named obligee on the indemnity bond with said defendant and therefore can not maintain this action against said defendant and for the further reason that the extension of time for performance of the removal contract granted defendant Century Investment Corporation, without the consent or approval of defendant Hartford Accident and Indemnity Company constituted a material variance of the contract of surety, increasing the risk assumed by said defendant which discharged its liability.

X.

That the defendants other than Century Investment Corporation now claiming ownership to any of said buildings Nos. 102, 103, 104 and 105 which have not been removed from sites pursuant to the terms of said contract, acquired no better title to said building or buildings than Century Investment

Corporation had and were not innocent purchasers of same without knowledge and notice of the contract expressed requirement that said buildings be removed from the site upon which they were situated at the time the contract between the plaintiff's agency and the defendant Century Investment Corporation was entered into, and therefore the plaintiff is entitled to specific performance of said contract as against each and all of said present purported owners for the same reasons as stated in paragraph VIII hereof; and that the court should retain jurisdiction of this action until such buildings are removed and the sites upon which they now stand are cleared as the contract required; that Century Investment Corporation and each of the defendants now asserting ownership to each of said buildings should immediately give notice to all tenants to vacate at earliest lawful date and should remove the same from its present site and clear such site by a date to be fixed by the court, such site clearance to be accomplished as follows:

(1) Remove buildings with wood floors down to ground level, including wood, brick or concrete block foundation posts or piers; remove all concrete, including slabs and entrance walks, upon and beneath the surface of the ground;

(2) Take down, preserve, and replace as directed by owner of same, telephone, telegraph or other wires or fences and their appurtenant poles or posts or other interferences which may

obstruct the removal of the buildings; excepting those serving buildings not included in this contract;

(3) Have all services, such as water, gas, steam, electricity and telephones, disconnected at the service mains in accordance with the rules and regulations of the owners of the utility involved or the local municipality. Securely cap and seal all storm and sanitary sewers leading from structures to be removed and backfill only after inspection by a person named in four (4) below. Cap water service line at foot of riser to dwelling. Preserve all active utilities traversing the project site.

(4) Remove all salvage (except as specified herein) and debris resulting from the operation and all tools and apparatus from the site, restore the site of the buildings, as far as possible, to its condition immediately prior to the removal of the buildings by filling solidly any holes or trenches resulting from the operation and leave the site clean and free from hazards, all to the satisfaction and approval of E. Stanton Foster, Regional Director P.H.A., or George Weis, Realty Disposition Officer, P.H.A.; that all the structures, buildings, materials and things mentioned above are now located on or under the surface of the land described in par. XI of the foregoing Findings, and should be forthwith removed by defendants and this Court's decree should issue accordingly; and all

utility service to the lands, buildings and structures above described should be disconnected by defendants or at their expense.

XI.

That the plaintiff presently has, and at all times material to this action had, the exclusive use of the real estate underlying buildings Nos. 102, 103, 104 and 105 of project Wash-45302, excepting only certain street areas belonging to the City of Seattle, Washington; that said estate of exclusive use of said land was originally acquired by the plaintiff by condemnation proceedings had in civil action No. 1143, now pending in this court; that the right to same has not been terminated and that the plaintiff presently has the right to renew the same without the consent of, or notice to, the owners of said land by reason, particularly, of the terms and provisions of Section 301 of the Lanham Act (42 U.S.C., Section 1541) and Joint Resolution, being Public Law 450, c. 570, Act of July 3, 1952 (66 Stat. 332), and also Joint Resolution, being Public Law 12, c. 13, Act of March 31, 1953 (67 Stat. 18); that the plaintiff is therefore entitled to a decree restraining and enjoining any and all parties from interfering with the plaintiff's enjoinment of said exclusive use.

XII.

That the plaintiff has been damaged by the wrongful use of said buildings by the defendants from the time of said breaches of contract by defendant Century Investment Corporation, in using same for

commercial rental purposes to and including the present time and for such future time as said buildings remain on site and for the wrongful use of the land underlying said buildings, and defendants continue to so use said buildings and property which is for the exclusive use of the plaintiff, from said time of said breaches of contract to and including the present time; that the plaintiff is entitled to a complete accounting, to be performed under the direction of this court, of all revenues received from and current operating expenses incidental to such commercial uses to determine monetary damages sustained by the plaintiff on account of the alleged breach of contract herein, and that the court should retain jurisdiction of this action for these reasons and should fix a date for the hearing on same.

XIII.

That each and all of the cross-complaints brought by one or more of the defendants against the plaintiff herein, should be dismissed.

Done in Open Court this 20th day of October, 1955.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and Approved by:

/s/ JOHN A. ROBERTS, JR.,
Assistant United States Attorney, of Counsel for Plaintiff.

[Endorsed]: Filed October 20, 1955.

[Title of District Court and Cause.]

ORDER DIRECTING REFERENCE AND APPOINTING SPECIAL MASTER

This cause having proceeded to trial and the court having heretofore entered its Findings of Fact and Conclusions of Law, and having concluded that the matter of the accounting of funds received by each of the defendants from the unauthorized commercial use of the temporary buildings involved in this action should be referred to a Special Master to settle the same and report thereon, before the court enters its final decree, and the court being fully advised in the premises, now therefore,

It Is Ordered that the accounting of funds received by each of the defendants herein from the unauthorized commercial use of buildings 102, 103, 104, and 105, P.H.A. project Wash-45302, whose respective interests are enumerated in the Findings of Fact and Conclusions of Law entered herein, is hereby referred to Don S. Griffith, of Seattle, Washington, as Special Master, to hear the parties and their evidence, and to report to this court his findings of fact and conclusions thereon as to the total profit received by each of the defendants from July 14, 1953, to the date of such report, together with such parts of the evidence as any party may request in writing.

It Is Further Ordered that the accounting shall be made from original records and that the total profit above referred to shall be the difference between the total gross revenue received from the

commercial use of each of said buildings and the current or normal operating expenses of each; except that said expenses may also include depreciation, based on current Internal Revenue Service useful life standards, for the minimum capital expenditures only, necessarily incurred in conforming said buildings to requirements of the City of Seattle, Washington. The master shall further find and report to the Court the portion in dollars and cents of the rental value contributed by the personal property furnished by defendants.

It Is Further Ordered that the Special Master shall report his findings and conclusions to this court within thirty days of the entry of this order, and the court hereby expressly postpones the entry of a Final Decree in this action pending receipt of such report.

It Is Further Ordered that all compensation of, and reasonable costs incurred by, the Special Master shall be determined by the Court and taxed against the defendants herein.

Done in Open Court this 21st day of October, 1955.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and Approved by:

/s/ JOHN A. ROBERTS, JR.,
Assistant United States Attorney, of Counsel for Plaintiff.

[Endorsed]: Filed October 21, 1955.

[Title of District Court and Cause.]

REPORT OF SPECIAL MASTER

* * *

EXHIBIT C

Edward R. Ester

Statement of Income

For the period May 1, 1954, to November 16, 1955
(On the cash basis of accounting)

	Period 5-1-54— 9-30-55	Period 10-1-55— 11-16-55	Totals
Rentals received	$8,441.75	$343.35	$8,785.10
Operating expenses:			
Maintenance, labor	985.04	50.00	1,035.04
Maintenance, materials	782.94	49.29	832.23
Electricity	543.12	68.40	611.52
Fuel	358.60		358.60
Supplies	188.73	8.87	197.60
Insurance	68.15	8.98	77.13
Water	65.07	21.10	86.17
Real estate taxes	58.06		58.06
Advertising	36.07	8.58	44.65
Truck expenses, pro-rated amount	186.33	64.36	250.69
Total operating expenses	$3,272.11	$279.58	$3,551.69
Income from operations before provision for depreciation	$5,169.64	$ 63.77	$5,233.41

Provision for depreciation:			
Building improvements	$ 732.60	$ 62.43	$ 795.03
Equipment, operating	698.14	58.12	756.26
Equipment, construction, pro-rated amount	16.59	4.62	21.21
	$1,447.33	$125.17	$1,572.50
Net income	$3,722.31	$(61.40)	$3,660.91

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL REPORT OF SPECIAL MASTER

* * *

II.

A. Findings of Fact:

That defendants Arthur G. Barnett and wife and Donald F. Owens and wife have received gross revenues from the operation of building 104 for the period commencing June 1, 1954, and ending November 16, 1955, in the amount of $13,097.35 and during such period have made allowable expenditures in the aggregate amount of $7,814.54; that the amount of said gross revenue attributable to personal property belonging to the said Arthur G. Barnett and wife and Donald F. Owens and wife, and used in said building is the sum of $1,573.50; that

each of the above items are particularly described in the annexed statement marked "Exhibit B" which is incorporated herein by this reference.

B. Conclusions of Law:

That defendants Arthur G. Barnett and wife and Donald F. Owens and wife, have received a profit from the unauthorized commercial use of building 104, for the period indicated above, in the amount of $5,282.81, of which $1,573.50 represents revenue from personal property owned by them and used in the operation of said building.

C. Comments:

The comments made in paragraph I hereof are adopted herewith.

III.

A. Findings of Fact:

That defendants Edward R. Ester and wife have received gross revenue from the operation of building 105 for the period commencing May 1, 1954, and ending November 16, 1955, in the amount of $8,-785.10 and during such period have made allowable expenditures in the aggregate amount of $5,020.51; that the amount of said gross revenue attributable to personal property belonging to the said Edward R. Ester and wife and used in said building is the sum of $1,332.00; that each of the above items are particularly described in the annexed statement marked "Exhibit C," which is incorporated herein by this reference.

B. Conclusions of Law:

That defendants Edward R. Ester and wife have received a profit from the unauthorized commercial use of building 105, for the period indicated above, in the amount of $3,764.59, of which $1,332.00 represents revenue from personal property owned by them and used in the operation of said building.

C. Comments:

The comments made in paragraph I hereof are adopted herewith.

* * *

Respectfully submitted,

/s/ DON S. GRIFFITH,
Special Master.

EXHIBIT B

Barnett and Owens

Statement of Income

For the period June 1, 1954, to November 16, 1955
(On the cash basis of accounting)

	Period 6-1-54— 9-30-55	Period 10-1-55— 11-16-55	Totals
Rentals received	$11,912.35	$1,137.50	$13,049.85
Income from washing machines	35.00		35.00
Other income, refunds, etc.	12.50		12.50
Gross income	$11,959.85	$1,137.50	$13,097.35

	Period 6-1-54— 9-30-55	Period 10-1-55— 11-16-55	Totals
Operating expenses:			
Fuel	$ 2,357.68	$ 298.82	$ 2,656.50
Maintenance & repairs	1,126.64	68.18	1,194.82
Insurance	269.53	20.88	290.41
Water	243.50	29.10	272.60
Electricity	153.88	22.76	176.64
Real estate taxes	158.37		158.37
Advertising	123.94	5.61	129.55
Accounting services	69.75		69.75
Telephone	45.72		45.72
Manager's services	35.00	35.00	70.00
Social security taxes	23.96	5.33	29.29
Bank charges	19.42	1.45	20.87
Unemployment compensation	16.74	3.59	20.33
Miscellaneous	11.50		11.50
Total operating expenses	$ 4,655.63	$ 490.72	$ 5,146.35
Income from operations before provision for depreciation	$ 7,304.22	$ 646.78	$ 7,951.00
Provision for depreciation:			
Building improvements	$ 1,653.24	$ 149.39	$ 1,802.63
Equipment	789.62	75.94	865.56
	$ 2,442.86	$ 225.33	$ 2,668.19
	1,673.42	144.44	1,817.86
Net income	$ 4,861.36	$ 421.45	$ 5,282.81

Barnett and Owens

Reconciliation of Income as Reported by Defendants
To September 30, 1955

Net income to 9/30/55 per Master's statement annexed	$4,861.36
Net loss to 9/30/55 per defendant's statement	(994.36)
Reduction, summarized below	$5,855.72

Summary of deductions disallowed by Master:

1. Interest paid on bank loans	$1,031.94
2. Interest paid on original purchase contract	325.34
3. Depreciation:	
On original building cost and improvements	4,518.11
On equipment	400.13
4. Miscellaneous adjustments	50.50
Less expenditures allowed as capital improvements in original report now allowed as expenses	470.30
	$5,855.72

EXHIBIT C

Edward R. Ester

Statement of Income

For the period May 1, 1954, to November 16, 1955
(On the cash basis of accounting)

	Period 5-1-54— 9-30-55	Period 10-1-55— 11-16-55	Totals
Rentals received	$8,441.75	$343.35	$8,785.10
Operating expenses:			
Maintenance, labor	756.62	50.00	806.62
Maintenance, materials	230.58	49.29	279.87
Electricity	543.12	68.40	611.52
Fuel	358.60		358.60

	Period 6-1-54— 9-30-55	Period 10-1-55— 11-16-55	Totals
Supplies	188.73	8.87	197.60
Insurance	68.15	8.98	77.13
Water	65.07	21.10	86.17
Real estate taxes	58.06		58.06
Advertising	36.07	8.58	44.65
Truck expenses, pro-rated amount	618.07	64.36	682.43
Total operating expenses	$2,923.07	$279.58	$3,202.65
Income from operations before provision for depreciation	$5,518.68	$ 63.77	$5,582.45
Provision for depreciation:			
Building improvements	958.69	81.70	1,040.39
Equipment, operating	698.14	58.12	756.26
Equipment, construction pro-rated amount	16.59	4.62	21.21
Net income	$3,845.26	$(80.67)	$3,764.59

Edward R. Ester

Reconciliation of Income as Reported by Defendants
To September 30, 1955

Net income to 9/30/55 per Master's statement annexed	$3,845.26
Net loss to 9/30/55 per defendant's statement	(1,288.30)
Reduction, summarized below	$5,133.56

Summary of deductions disallowed by Master:

1. Expenditures claimed but not supported by vouchers	$1,809.85
2. Adjustment of expenditures as between capital and operating expense	1,060.50

3. Depreciation:	
On buildings and improvements	2,033.07
On operating equipment	130.26
On construction equipment	40.97
4. Miscellaneous adjustments	58.91
	$5,133.56

[Endorsed]: Filed January 18, 1956.

United States District Court, Western District of Washington, Northern Division
No. 3804

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CENTURY INVESTMENT CORPORATION, a Corporation; HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation; A. E. SHERMAN and JANE DOE SHERMAN, His Wife; VIRGIL J. PAGUE and JANE DOE PAGUE, His Wife; CARL W. PAGUE and JANE DOE PAGUE, His Wife; ARTHUR G. BARNETT and JANE DOE BARNETT, His Wife; EDWARD R. ESTER and JANE DOE ESTER, His Wife, and DONALD F. OWENS and JANE DOE OWENS, His Wife,
Defendants.

EXCEPTIONS OF VIRGIL J. PAGUE TO SUPPLEMENTAL REPORT OF SPECIAL MASTER

Defendant Virgil J. Pague excepts to the Supplemental Report of Special Master as follows:

1. This defendant excepts to the Finding in Paragraph I that the allowable expenditures are in the amount of $20,519.39 for the reason that this figure fails to take into consideration the proper method of allowing depreciation on the improvements, inasmuch as depreciaion is confined to expenditures to bring the buildings up to Code requirements, and excludes depreciation upon the buildings themselves which constitute personal property belonging to and furnished by this defendant, and further, that the basis of depreciation is a 30-year life, whereas the improvements would have a useful life of not to exceed 5 years, even if removal in accordance with the Court's indicated order is not required, because of limitations in the buildings permits by which the improvements were made, the resolution of the City Council permitting continuance of the buildings on site, and the arrangements whereby the street areas are occupied by the buildings. But if the Court's indicated order is to be carried out and the buildings are to be immediately removed from the site, the amount of depreciation allowed should include the entire unrecovered cost of improvements, as indicated on Exhibit "D" of the Master's Report in the amount of $6,298.53.

2. Exception is further taken to the figure of $20,519.39 previously mentioned representing Master's finding of amount of allowable expenditures, for the reason that there is excluded therefrom the various legal fees, the interest paid on original building cost, on building improvements and equip-

ment, these being the amounts shown on Exhibit "A" to the Master's Report as items disallowed.

3. Exception is taken to that portion of subparagraph B of Paragraph I of the Report of the Special Master, wherein the Master concludes that this defendant has received a profit of $6,765.13 for unauthorized commercial use of buildings 102 and 103, for the reason that this figure fails to take into account the charge-off of the unrecovered cost of improvements as indicated in Exhibit "D" to the Master's Report, and is based upon an erroneous computation arrived at by the use of the figure of $20,519.39 for allowable expenditures, which figure is erroneous in the respects pointed out in the preceding paragraphs hereof.

4. Exception is taken to that portion of subparagraph B of Paragraph I wherein it is concluded that $828.00 represents revenue from personal property owned by this defendant and used in the operation of said buildings, for the reason that said figure is arbitrary, not based upon any evidence or stipulation, and fails to include that portion of the income derived from buildings owned by this defendant and constituting personal property.

5. Exception is further taken to the Report because it fails to segregate and credit to this defendant that portion of the income attributable to real property included within street areas, in which plaintiff has no interest but in which this defendant has sole right to possession.

6. Exception is taken to that portion of subparagraph C of Paragraph I of the Master's Supplemental Report wherein depreciation of allowable capital improvements has been determined on a 30-year useful life basis, for the reason that a 30-year useful life basis is not justified in this case and is not in accordance with the provisions of Bulletin F of the Internal Revenue Service, which in part provides:

> "The useful life of a building for business purposes depends to a large extent on the suitability of the structure to its use and location, its architectural quality, the rate of change in population, the shifting of land values, as well as the extent of maintenance and rehabilitation."

Further, the Master is in error in using a 30-year useful life basis, for the reason that he is applying the same to improvements rather than to the buildings themselves, whereas Bulletin F of the Internal Revenue Service, upon which he has based his computations, provides for a shorter average useful life for various items of building equipment such as are involved here, including, for example, plumbing, lighting systems and fixtures, all of which are given an average useful life of less than 30 years, being 20 years in the case of wiring, 15 years in the case of faucets, 20 years in the case of iron hot water pipes, as examples, and the 30-year average useful life basis is wholly unrealistic and out of harmony with

the rules for the computation of Internal Revenue depreciations.

LYCETTE, DIAMOND & SYLVESTER,
Attorneys for Virgil J. Pague;

By LYLE L. IVERSEN.

Receipt of copy acknowledged.

[Endorsed]: Filed January 27, 1956.

United States District Court, Western District of Washington, Northern Division

No. 3804

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CENTURY INVESTMENT CORPORATION, et al.,
Defendants.

MOTION OF VIRGIL J. PAGUE TO STRIKE SUPPLEMENTAL REPORT OF SPECIAL MASTER

Defendant Virgil J. Pague moves to strike the supplemental report of special master for the reason that the same is a report of irrelevant facts having no relation to damages due plaintiff or to any issue

properly before the court in this case. This motion is also made for the reason that the report of special master has not been made nor filed in conformity with the rules applicable thereto. This motion is made for the reason that the report is made upon a fundamentally wrong basis, having been made wholly without reference to the value of the plaintiff's leasehold or damage thereto or to any monetary damage suffered by plaintiff by any breach of contract or action of any of the defendants, and further for the reason that the rule of court relative to special masters has not been complied with in the filing of the transcript herein.

LYCETTE, DIAMOND &
SYLVESTER,
Attorneys for Defendant
Virgil J. Pague,

By /s/ LYLE L. IVERSEN.

Receipt of copy acknowledged.

[Endorsed]: Filed February 28, 1956.

[Title of District Court and Cause.]

SUPPLEMENTAL OBJECTIONS OF DEFENDANTS BARNETT AND OWENS, AND DEFENDANT ESTER TO SPECIAL MASTER'S REPORTS, INCLUDIUG SECOND SUPPLEMENTAL MEMORANDUM—TRANSCRIPT OF PROCEEDINGS .BEFORE SPECIAL MASTER FILED MARCH 9, 1956

* * *

IV.

That attached hereto and marked Defendants Barnett, Owens and Ester's Exhibit "J" and entitled "Comparative Statement of Income and Expense for Virgil J. Pague, Barnett and Owens and Edward R. Ester," prepared from the Special Master's Supplemental Report and Exhibits, and showing the comparative percentages of expenses and net profit to gross income. This is based on the Master's determinations and accounting as to the defendants and shows the comparisons between the defendants on a percentage basis. We summarize here the important percentages and refer to Exhibit "J" which shows the detailed breakdown:

Percentage of Operating Expense to Gross Revenue:

Pague allowed 68.003% of gross revenue $27,-284.52.

Barnett and Owens 39.293% of $13,097.35.

Ester 36.455% of $8,785.10.

Although the Barnett and Owens gross income is 48.003% of Pague's the Master's method of accounting and allocation of operating expenses (less depreciation to Pague and none to Barnett and Owens, but disallowing operating expenses to Barnett and Owens) the percentage results in being altered as to net income so that instead of the same ratio of 48.003% applying to net income, it jumps to 78.089%. Thus Barnett and Owens end up with a profit, according to the Master, of $5,282.81 and Pague with $6,765.13. To have been consistent (and without discrimination based on the peculiarities of accounting) the net income of Barnett and Owens should have been not over 48.003% of $6,765.13, or approximately $3,247.47.

Relating said Exhibit J to defendant Ester—although the gross income of Ester is 32.198% as compared with Pague's the net income appears to jump to 55.647% because the Master ends up with a net income of $6,765.13 for Pague and $3,764.59 for Ester as a result of disallowing operating expense items and charging off some of said items to depreciation. To be consistent the comparative percentage applying on gross income of 32.198% as applied to net income would have resulted in a figure of $2,178.24.

V.

A. Defendant Ester objects to the arbitrary action of the Master in disallowing items submitted by Ester, unsupported by vouchers or checks, while allowing similar items as hereinafter set forth, to defendant Pague:

Exhibit "G" Document 114:

Page 0001 entitled Supplemental Memorandum —Transcript of Proceedings before Special Master filed Feb. 27, 1956:

6 items following date 12/53 totalling..$557.11

Page 0002 3/22/54 carpenter labor allocated by journal entry only..... 159.02

11/20/53 Carpenter labor..... 76.00

" Carpenter labor..... 235.00

" Materials allocated by journal entry only..... 37.10

$507.12

Page 0003 under column "caretaker's wages," no symbol, quotation, "y" or "dot" used by Master to indicate inspection of checks or invoices.....$608.00

Page 0003 under column "R and M" (repair and maintenance):

$14.38 —by journal voucher transfer only

11.28 —held out from rents, no receipts

17.07 — " " " " " "

50.70)

14.99)—journal voucher transfer, no explanation

11.70 —held out from rent—WAHL

2.00 —cash out

(R and M cont.) $2100.00—allocation from Uptown Motors ⅙ of monthly payment or $100 a month)

DEFENDANTS EXHIBIT "J"
(Of Barnett & Owens, and Ester)

Comparative Statement of Income & Expense for Virgil J. Pague, Barnett & Owens & Edward R. Ester
Prepared from Master's Amended Report with Comparative Percentages of Expenses to Gross Income

	Virgil J. Pague Sept. 1, 1953, to Nov. 16, 1955		Barnett & Owens June 1, 1954, to Nov. 16, 1955		Edward R. Ester May 1, 1954, to Nov. 16, 1955	
	Amount	% of Gross Income	Amount	% of Gross Income	Amount	% of Gross Income
Rentals Received	$27,043.02		$13,049.85		$8,785.10	
Miscellaneous Receipts	241.50		47.50			
Gross Income	$27,284.52	100.000%	$13,097.35	100.000%	$8,785.10	100.000%
Operating Expenses:						
Fuel	$ 9,064.92	33.224%	$ 2,656.50	20.283%	$358.60	
Truck Expense					682.43	$1,041.03 11.850%
Maintenance and Repair	$4,823.07		$1,194.82		279.87	
Supplies					197.60	
Maintenance Labor					806.62	
Caretaker's Wages	608.00		70.00			
Payroll Taxes	5,431.07	19.905%	49.62	1,314.44 10.036%		1,284.09 14.616%
Electricity	1,741.75	6.384%		176.64 1.349%		611.52 6.961%
Water	644.92	2.363%		272.60 2.081%		86.17 .981%
Telephone				45.72 .349%		
Accounting				69.75 .533%		
Land Rent	1,000.00	3.665%				
Commission Paid	250.00	.916%				
Real Estate Taxes	211.40	.775%		158.37 1.209%		58.06 .661%
Survey	79.46	.291%				
Insurance	40.29	.148%		290.41 2.217%		77.13 .878%
Advertising				129.55 .989%		44.65 .508%
Bank Charges				20.87 .159%		
Miscellaneous	90.54	.332%		11.50 .088%		
Total Operating Expenses	$18,554.35	68.003%	$ 5,146.35	39.293%	$3,202.65	36.455%
Depreciation	1,965.04	7.202%	2,668.19	20.372%	1,817.86	20.693%
Total Expenses	$20,519.39	75.205%	$ 7,814.54	59.665%	$5,020.51	57.148%
Net Income	$ 6,765.13	24.795%	$ 5,282.81	40.335%	$3,764.59	42.852%

Note: The Special Master found that defendant Virgil J. Pague's Gross Receipts ($27,284.52) yielded a Net Profit of $6,765.13 or 24.795%. Applying the same percentage to Barnett & Owens and Ester's Gross Receipts would give the following result:
Barnett & Owens 24.795% of $13,097.35—$3,247.47,
Edward R. Ester 24.795% of $ 8,785.10—$2,178.27.

Receipt of copy acknowledged.

[Endorsed]: Filed March 23, 1956.

Page 0003 under column "other" (no date)
allowed journal voucher, hose and sprinkler, without receipt.....$ 14.43
(no date) held out from rent, no receipts 7.46
(no date) commission..... 250.00

This shows example of inconsistent and capricious action of the Master in denying to defendant Pague what the Master allowed to defendants Barnett and Owens.

B. Page 0003
3/12/54 disallowed Jesse Epstein
legal expenses $250.00

VI.

Defendants Barnett and Owens and Ester object to the Master's allowance of repair items similar to items claimed by Barnett and Owens and Ester, but arbitrarily capitalized by the Master. Thus, by now allowing the deductions in the year when allowed to Pague as expenses against gross income, the Master by arbitrary classification, put 80% of the items by the sum of the digits method ahead to be allowed over an imaginary period of some twenty years, remaining out of the thirty years useful life.

We refer to document 114—Exhibit "G";

A. Page 0003 under column marked "R and M" (repair and maintenance), the following appears:

1. Under date of July 31, 1954, three windows were allowed as "R and M" expense at a cost of

$8.42 to Pague, under date of 2/11/54, glass, $7.08 allowed Pague as operating expense, whereas on a similar item affecting Ester, Exhibit "I," page 0008, $32.80 was capitalized, and a similar item appearing at page 0012, $9.27 under date of 12/6/54 was capitalized.

2. Under date of 12/31/53, electrical repairs, Pague was allowed $226.91 as "R and M" expense whereas affecting Barnett and Owens a similar item appearing in Exhibit "F"-1, page 0001, the following items were capitalized: 3/18/54—$47.98; 6/4/54—$200.00; 6/29/54—$30.87.

3. Under date of 3/54, repair motor for boiler room, $86.52 was allowed to Pague which affecting Ester on Exhibit "I," page 0019, item 3, $50.00 was disallowed.

4. Under date of 7/54, lumber and burner repair was allowed Pague, $45.01 as repairs. On Exhibit "F-1" pages 0001 and 0002 there are eight lumber items totalling $92.78 which were capitalized.

5. Under date of 8/54 window shades, $38.56, allowed Pague as repairs whereas affecting defendant Ester, Exhibit "I," page 0012, 7/26/54, $2.86 was capitalized, and as affecting Barnett and Owens under Exhibit "F-1," page 0001, date 8/4/54, $36.05 was capitalized and also capitalized on page 0002, date 6/54 was an item of $16.00.

6. Refrigerator repair $206.46 allowed Pague
" " 236.07 " " ,
which indicates the Master allowing repair items

and allowing generally no repair items to defendants Barnett, Owens and Ester, but allocating most of the repair expenses as capital depreciable items.

7. 9/23/55 painting, $634.18 allowed Pague for maintenance, whereas, affecting Ester, document 114, Exhibit "I," page 0004, there is attached a Pittsburgh receipt showing expense to Barnett, Owens and Ester, of which the amount of $26.45 was charged to Ester, but capitalized by the Master, also as affecting Ester see Exhibit "H," page 0003 under date of 1/6/54 paid $172.48 capitalized and under date of 2/9/54 paid $117.50 capitalized. Affecting Barnett and Owens on Exhibit "F-1," page 0002 there are twelve items marked "painting," with a total of $438.20 capitalized.

No date—new faucet installed, $20.77, allowed Pague, whereas affecting Barnett and Owens, Exhibit "F-1," page 0002, three plumbing items appear $1.72, $10.82, $6.17, totalling $18.71 capitalized.

B. Under Document number 114, Exhibit "G," page 0003, allowed $79.46 to defendant Pague as operating for a survey, instead of capitalized as a land expense; and also allowed three items $5.10, $20.40 and $29.46 for garbage cans, as operating expense, while capitalizing same items against Ester, Document 114, Exhibit "I," page 0004, $20.00; and page 0001, June 8, 1955, $13.92.

VII.

In the Special Master's original Report, Ester was allowed as operating expense, all the labor and

material items for which he had receipts; and Ester was requested to produce receipts for items disallowed. Ester produced receipts, and other evidence stipulated as acceptable by Plaintiff's counsel at the hearing before the Master on January 9, 1956. The Master in his Supplemental Report added the additional items for which receipts were filed and transferred 70% thereof from operating to capital improvements. In addition, the Master disallowed and ignored the stipulated items. Therefore, the defendant Ester objects to the arbitrary capitalization of 70% of the labor, totalling $1,765.46 from the date of occupancy of the buildings to September 30, 1955, and materials totalling $538.02 as appearing on Document 116, page 0010, and to the disallowance of 100% of these items as operating expense, to the disallowance of the stipulated items, and to the capricious, unjust and discriminating accounting actions of the Master.

* * *

X.

The Master has arbitrarily used a thirty-year basis for depreciation on a sum of the digits method. As an example of why this is unjust, defendants Barnett and Owens refer to their repair and substitution of a better heating system based on paying off the cost of the same during the five years allowed under City of Seattle Resolution and Building permits. The testimony shows that the percentage of saving, estimated on an engineering basis by defendant Owens, who is a heating engineer,

employed in a heating business, had calculated correctly that the cost of the same could be paid off in five years. This is against the Master's speculation that the same is chargeable on the balance of thirty-year life and furnishes proof that the same should be charged off on a five-year depreciation, at the very least. See Exhibit J showing fuel costs on the part of the defendant Pague of 33.224% compared to Barnett and Owens of 20.283%, a saving of about 39% of fuel costs by Barnett and Owens per unit. Thus the Master's method penalizes Barnett and Owens for some reason not understandable to these defendants.

Dated this 23rd day of March, 1956.

/s/ ARTHUR G. BARNETT,

/s/ ALEC DUFF,
Attorneys for Defendants
Barnett and Owens.

/s/ MORRIS A. ROBBINS,
Attorney for Defendant Ester.

[Title of District Court and Cause.]

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on before the undersigned Judge of the above-entitled Court on April 21, 1956, for entry of Supplemental Findings of Fact and Conclusions of Law and Judgment, and the Court having heretofore entered an Order approving and confirming the supplemental report of Special Master, filed herein on January 18, 1956, and the plaintiff, United States of America, being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington, and John A. Roberts, Jr., Assistant United States Attorney for said district, and the said defendants, being the owners of the real estate involved in this action and indentified in Paragraph XI of the Findings of Fact and Conclusions of Law entered by the Court on October 20, 1955, appearing in person and by their respective counsel of record herein, and the Court having heard arguments of counsel and being fully advised in the premises, does now, from a preponderance of the evidence, by way of supplement and amendment of the Findings of Fact and Conclusions of Law heretofore entered herein on October 20, 1955, make the following supplemental and amendatory:

Findings of Fact

I.

That it was incumbent upon the plaintiff herein to prove its exclusive right of possession of the

land upon which the buildings, furniture, furnishings, equipment and appurtenances involved herein have, at all times material to this action, been and are now located.

II.

That the plaintiff has not fully sustained that burden, in that, although the judgment on the declaration of taking and the judgments awarding just compensation were valid, the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid; therefore, the Court cannot find that such installments have been paid and accordingly the Court now finds that the plaintiff is not entitled to the requested order that the defendants be specifically compelled to remove said buildings and clear the sites upon which they stand. This finding is based upon the necessity of the plaintiff establishing, in this action, its exclusive right of possession of said real estate.

III.

That the present and only estate in the land here in question now claimed by the plaintiff expires on July 1, 1956, and the plaintiff has no present intention of renewing or extending said estate by virtue of any existing judgment or order of this Court; that upon that date, the defendants, so far as existing judgments and orders of court are concerned, will be entitled to the exclusive possession of said real estate, and it would be more burdensome to them, than advantageous to the plaintiff, to require the defendants to specifically perform this Court's

previous contemplated order of building removal and site clearance. The Court finds that within about seventy (70) days of April 21, 1956, the defendants would have the right of exclusive possession of said lands and the right to move said buildings back on said lands; that from practical and compensatory standpoints the Court now finds that it is more just, considering the material equities and the law to, instead of compelling specific performance of removal and site clearance, require the defendants to pay a fair, reasonable, and just compensation by way of damages for their failure to remove and clear the sites of and for their wrongful commercial use of, said buildings and comply with all of the requirements of the contract of sale.

IV.

As to the property and property interests described in Par. XI, Subpar. a and b of the Findings of Fact entered herein October 20, 1955, that a fair, reasonable, and just award of damages to be awarded to the plaintiff and against the defendant Virgil J. Pague and defendant Century Investment Corporation jointly and severally, is the sum of Five Thousand Nine Hundred Thirty-seven and 13/100 Dollars ($5,937.13).

V.

As to the property and property interests described in Par. XI, Subpar. c of the Findings of Fact entered herein October 20, 1955, that a fair, reasonable, and just award of damages to be

awarded to the plaintiff and against the defendants Arthur G. Barnett and the marital community consisting of him and Virginia N. Barnett, his wife, and Donald F. Owens and the marital community consisting of him and Jean Owens, his wife, and defendant Century Investment Corporation, jointly and severally, is the sum of Three Thousand Seven Hundred Nine and 31/100 Dollars ($3,709.31).

VI.

As to the property and property interests described in Par. XI, Subpar. d of the Findings of Fact entered herein October 20, 1955, that a fair, reasonable, and just award of damages to be awarded to the plaintiff and against the defendants Edward R. Ester and the marital community consisting of him and Lorraine M. Ester, his wife, and defendant Century Investment Corporation, jointly and severally, is the sum of Two Thousand Four Hundred Thirty-two and 59/100 Dollars ($2,432.59).

VII.

That the Findings of Fact and Conclusions of Law entered herein on October 20, 1955, are reaffirmed in their entirety except that they are modified only as to the specific details enumerated herein.

VIII.

That a reasonable fee for services rendered by Don S. Griffith, Special Master herein, is the Sum of Two Thousand Five Hundred Dollars ($2,500.00) together with the reasonable sum of Eighty-three Dollars ($83.00) incurred by the Special Master for

the services of Mr. E. E. Lescher, court reporter; that one-fourth of these amounts should be paid by the plaintiff and three-fourths of said amounts should be paid by the defendants, and each of them, and in this regard the defendants' obligation shall be joint and several. That any and all other costs incurred in this action shall be paid by the parties incurring same.

That although as the Special Master found defendant Century Investment Corporation did not directly receive the profits of commercial use of the buildings, said defendent nevertheless is liable for all damages stated in paragraphs IV, V, and VI, above, and for three-fourths of the sums stated in paragraph VIII, above.

Done in Open Court this 26th day of April, 1956.

/s/ JOHN C. BOWEN,
United States District Judge.

And from the foregoing, the Court now makes and enters the following:

Conclusions of Law

I.

That it was incumbent upon the plaintiff to prove its exclusive right of possession of the land upon which the buildings, furniture, furnishings, equipment and appurtenances herein involved have, at all times material to this action, been and are now located and that the plaintiff has not fully sustained

that burden and is therefore not entitled to an order of this Court compelling the present owners of the land involved herein to remove the buildings and clear the sites upon which they stand.

II.

That the plaintiff is entitled to be compensated by these defendants by way of damages for their failure to remove and clear the sites, and for their wrongful commercial use of, said buildings and to comply with the removal requirements of the contract of sale entered herein on July 14, 1953.

III.

That respecting Finding No. IV above, the plaintiff shall be awarded damages against the defendant Virgil J. Pague and defendant Century Investment Corporation, jointly and severally, in the sum of Five Thousand Nine Hundred Thirty-seven and 13/100 Dollars ($5,937.13).

IV.

That respecting Finding No. V above, the plaintiff shall be awarded damages against the defendants Arthur G. Barnett and the marital community consisting of him and Virginia N. Barnett, his wife, and Donald F. Owens and the marital community consisting of him and Jean Owens, his wife, and defendant Century Investment Corporation, jointly and severally, in the sum of Three Thousand Seven Hundred Nine and 31/100 Dollars ($3,709.31).

V.

That respecting Finding No. VI above, the plaintiff shall be awarded damages against the defendants Edward R. Ester and the marital community consisting of him and Lorraine M. Ester, his wife, and defendant Century Investment Corporation, jointly and severally, in the sum of Two Thousand Four Hundred Thirty-two and 59/100 Dollars ($2,432.59).

VI.

That Don S. Griffith shall be awarded the reasonable sum of Two Thousand Five Hundred Dollars ($2,500.00) together with the sum of Eighty-three Dollars ($83.00) for his expenses and services as Special Master herein and that one-fourth of said amounts shall be paid by the plaintiff and three-fourths of said amounts shall be paid by the above-named defendants, and each and all of them, and in this regard the defendants' obligation shall be joint and several. That all other costs incurred in this action shall be paid by the parties incurring same.

Done in Open Court this 26th day of April, 1956.

/s/ JOHN C. BOWEN,
United States District Judge.

Receipt of copy acknowledged.

Lodged April 25, 1956.

[Endorsed]: Filed April 26, 1956.

United States District Court, Western District of Washington, Northern Division

No. 3804

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CENTURY INVESTMENT CORPORATION, a Corporation; HARTFORD ACCIDENT & INDEMNITY COMPANY, a Corporation; A. E. SHERMAN and JANE DOE SHERMAN, His Wife; VIRGIL J. PAGUE and JANE DOE PAGUE, His Wife; CARL W. PAGUE and JANE DOE PAGUE, His Wife; ARTHUR G. BARNETT and JANE DOE BARNETT, His Wife; EDWARD R. ESTER and JANE DOE ESTER, His Wife; and DONALD F. OWENS and JANE DOE OWENS, His Wife,

Defendants.

JUDGMENT AND DECREE

This Matter having come on for entry of Judgment this day, pursuant to notice, after having proceeded to trial before the undersigned Judge of the above-entitled Court on the 7th day of September, 1955, on the Complaint of the plaintiff, as amended, and the answers thereto and cross-complaints of the respective defendants above named and the plaintiff, United States of America, being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington, and

John A. Roberts, Jr., Assistant United States Attorney for said district, and the said defendants and all of them, having each appeared by their respective counsel of record herein, and witnesses having been sworn, testimony taken, and evidence adduced, and the trial having continued from day to day until September 17, 1955, and the Court having heretofore entered its Findings of Fact and Conclusions of Law, and thereafter having referred the matter of an accounting of funds received from the commercial use of the buildings described in the Findings of Fact and Conclusions of Law to a Special Master and the Master having filed his report and supplemental report and the Court having heard argument of counsel concerning same and having heretofore entered an Order confirming and adopting said supplemental report filed herein on January 18, 1956; and the Court having thereafter entered supplementary and amendatory Findings of Fact and Conclusions of Law, does now, therefore, being fully advised in the premises,

Order, Adjudge, and Decree as follows:

1. That on account of said contract of sale and off-site removal of buildings the plaintiff has been damaged by the wilful failure of the defendants, hereinafter named in this paragraph, to remove the buildings, described in the Findings of Fact and Conclusions of Law entered herein, and for their failure to clear the sites upon which they stand in accordance with the terms of the contract of sale entered into on July 14, 1953, all of the terms and

conditions of which are and were well known to these defendants, and for their wrongful commercial use of said buildings.

(a) That the plaintiff is hereby awarded reasonable damages and judgment against the defendant Virgil J. Pague and defendant Century Investment Corporation, jointly and severally, in the sum of Five Thousand Nine Hundred Thirty-seven and 13/100 Dollars ($5,937.13);

(b) That the plaintiff is hereby awarded reasonable damages and judgment against the defendants Arthur G. Barnett and the marital community consisting of him and Virginia N. Barnett, his wife, and Donald F. Owens and the marital community consisting of him and Jean Owens, his wife, and defendant Century Investment Corporation, jointly and severally, in the sum of Three Thousand Seven Hundred Nine and 31/100 Dollars ($3,709.31);

(c) That the plaintiff is hereby awarded reasonable damages and judgment against the defendants Edward R. Ester and the marital community consisting of him and Lorraine M. Ester, his wife, and defendant Century Investment Corporation, jointly and severally, in the sum of Two Thousand Four Hundred Thirty-two and 59/100 Dollars ($2,432.59).

2. That a fair, just, and reasonable fee for his services as Special Master herein is hereby awarded to Don S. Griffith in the sum of Two Thousand Five Hundred Dollars ($2,500.00), together with Eighty-

three Dollars ($83.00) incurred by him for the services of a court reporter; that one-fourth of said amounts, in the sum of $645.75 shall be paid by the plaintiff and three-fourths of said amounts, in the sum of $1,937.25, shall be paid by the defendants named in paragraphs 1 (a), (b), (c), hereinabove and each and all of them, and in this regard the defendants' obligation is joint and several.

3. That all other costs incurred herein shall be paid by the parties incurring same and all sums awarded the plaintiff herein shall bear interest forthwith after entry of this Judgment and Decree at the legal rate of 6% per annum until paid.

4. That defendants Hartford Accident & Indemnity Company, a corporation; Jane Doe Pague, whose true name is Geneva L. Pague; Carl W. Pague and Jane Doe Pague, his wife; and A. E. Sherman and Jane Doe Sherman, his wife, are hereby dismissed from this action without costs.

5. That each and all of the cross-complaints brought by one or more of the defendants against the plaintiff herein are hereby dismissed.

Done in Open Court this 26th day of April, 1956.

/s/ JOHN C. BOWEN,
United States District Judge.

Receipt of copy acknowledged.

Lodged April 25, 1956.

[Endorsed]: Filed April 26, 1956.

[Title of District Court and Cause.]

MOTION TO ALTER OR AMEND JUDGMENT AND DECREE

Come now the defendants, Arthur G. Barnett, Donald F. Owens and Edward R. Ester, and their respective marital communities, and move to alter or amend the judgment and decree of the above-entitled Court entered on April 26, 1956, as follows:

I.

That paragraphs 1, 1-b and 1-c, on page 2, awarding damages against these defendants, and paragraph 2 on pages 2 and 3, assessing a portion of the Special Master's fee against these defendants, have no basis in law or in fact.

II.

That the judgment and decree should be altered or amended to dismiss this action against these defendants.

This motion is supported by the affidavit of Arthur G. Barnett and memorandum of authorities furnished by these defendants.

Dated this 2nd day of May, 1956.

/s/ ALEC DUFF, and

/s/ ARTHUR G. BARNETT,

Attorneys for Arthur G. Barnett and Donald F. Owens.

/s/ MORRIS A. ROBBINS,

Attorney for Edward R. Ester.

Receipt of copy acknowledged.

[Endorsed]: Filed May 7, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY—JUNE 4, 1956

Present: Hon. John C. Bowen, U. S. District Judge.

Court convenes at 10:00 a.m. on June 4, 1956, pursuant to the order of adjournment, and hears the following matters:

Now, on this 4th day of June, 1956, this cause comes on before the Court for hearing on motion of defendants Arthur G. Barnett Donald F. Owens, and Edward R. Ester to alter or amend the judgment and decree. John Roberts appears on behalf of the Government; Arthur G. Barnett appears on behalf of Barnett and Owens; Lyle L. Iversen appears for Century Investment Corporation, and Morris Robbins appears for Edward R. Ester.

The motion is called and the Court hears arguments of all counsel in the case. After hearing such arguments, the Court on its own motion amends, by interlineation. the judgment and decree entered in the case on April 26, 1956, by adding after "that" (page 2, line 8) the following words: "on account of said contract of sale and off-site removal of buildings," such interlined amendment, effective as of April 26, 1956, was made and initialed by the Court. The Court denies the motion as to each and all its parts as to each and all defendants, and further denies any and all other pending motions, and it is so ordered.

Journal No. 50—Page 198.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANTS, CENTURY INVESTMENT CORP., AND VIRGIL J. PAGUE

Notice Is Hereby Given That Century Investment Corporation, a corporation, and Virgil J. Pague, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this action on April 26, 1956.

Dated at Seattle, Washington, this 27th day of June, 1956.

LYCETTE, DIAMOND & SYLVESTER,

By /s/ LYLE L. IVERSEN,

/s/ LYLE L. IVERSEN,

Attorneys for Appellants and Cross-Appellants, Century Investment Corp., and Virgil J. Pague.

[Endorsed]: Filed June 27, 1956.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL OF DEFENDANTS, ARTHUR G. BARNETT, DONALD F. OWENS, AND EDWARD R. ESTER

Notice Is Hereby Given that Arthur G. Barnett and Virginia N. Barnett, his wife; Donald F. Owens

and Jean Owens, his wife; and Edward R. Ester and Lorraine M. Ester, his wife, defendants above named, hereby jointly appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree of the above-entitled Court signed April 26, 1956, and entered April 30, 1956, insofar as said judgment and decree affect these defendants.

Dated at Seattle, Washington, this 31st day of July, 1956.

ARTHUR G. BARNETT, and
ALEC DUFF,

By /s/ ARTHUR G. BARNETT,
Of Attorneys for Arthur G. Barnett and Donald F. Owens.

/s/ VERNON W. TOWNE,
Attorney for Edward R. Ester.

Receipt of copy acknowledged.

[Endorsed]: Filed July 31, 1956.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Arthur G. Barnett and the Marital community of him and Virginia V. Barnett; and Don-

ald F. Owens and the Marital Community of him and Jean Owens, two of the defendants above named, as Principal, and American Bonding Company of Baltimore, a Maryland corporation, as Surety, are held and firmly bound unto the United States of America in the sum of Three Thousand and no/100 ($3,000.00) Dollars, for which sum well and truly paid, the undersigned Principal and Surety bind themselves, their heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Whereas, the Principals above named are desirous of appealing and are filing this bond pursuant to the order of the United States Court of Appeals for the Ninth Circuit in Cause No. 15219 dated the 14th day of August, 1956, entitled: "United States of America, Appellant, vs. Century Investment Corporation, et al., Appellees," fixing the amount of supersedeas bond for Cross-Appellants, Arthur G. Barnett and the Marital Community of him and Virginia V. Barnett; and Donald F. Owens and the Marital Community of him and Jean Owens, jointly in the sum of $3,000.00.

Now, Therefore, the condition of the above obligation is such that if the said Principals shall prosecute their appeal to effect and satisfy the said judgment in full, together with costs, interest and damages for delay if for any reason the appeal is dismissed, or if the judgment is affirmed and satisfied in full, such modification of the judgment and such costs, interest and damages as the Appellate

Court may adjudge and award, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed and dated this 20th day of August, 1956.

Arthur G. Barnett and the Marital Community of him and Virginia V. Barnett,

By /s/ ARTHUR G. BARNETT.

Donald F. Owens and the Marital Community of him and Jean H. Owens,

By /s/ DONALD F. OWENS.

[Seal] AMERICAN BONDING COMPANY OF BALTIMORE,

By /s/ GUERTIN CARROLL,
Attorney in Fact.

Approved: 8/21/56.

/s/ JOHN A. ROBERTS, JR.,
Assistant U. S. Attorney;

/s/ CHARLES P. MORIARTY,
United States Attorney.

Bond approved: 8/21/56.

/s/ JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed August 21, 1956.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Edward R. Ester and the Marital Community of him and Lorraine M. Ester, one of the defendants above named, as Principal, and American Bonding Company of Baltimore, a Maryland corporation, as Surety, are held and firmly bound unto the United States of America in the sum of Two Thousand Five Hundred and no/100 ($2,500.00) Dollars, for which sum well and truly paid, the undersigned Principal and Surety bind themselves, their heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Whereas, the Principal above named is desirous of appealing and is filing this bond pursuant to the order of the United States Court of Appeals for the Ninth Circuit in Cause No. 15219 dated the 14th day of August, 1956, entitled: "United States of America, Appellant, versus Century Investment Corporation, et al., Appellees," fixing the amount of supersedeas bond for Cross-Appellant, Edward R. Ester and the Marital Community of him and Lorraine M. Ester, in the sum of $2,500.00.

Now, Therefore, the condition of the above obligation is such that if the said Principal shall prosecute his appeal to effect and satisfy the said judgment in full, together with costs, interest and damages for delay if for any reason the appeal is dismissed,

or if the judgment is affirmed and satisfied in full, such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed and dated this 20th day of August, 1956.

Edward R. Ester and the marital community of him and Lorraine M. Ester.

By /s/ EDWARD R. ESTER.

[Seal] AMERICAN BONDING COMPANY OF BALTIMORE,

By /s/ GUERTIN CARROLL,
Attorney-in-Fact.

Approved 8/21/56.

/s/ JOHN A. ROBERTS, JR.,
Asst. U. S. Atty.

/s/ CHARLES P. MORIARTY,
U. S. Atty.

Bond approved 8/21/56.

/s/ JOHN C. BOWEN,
U. S. District Judge.

[Endorsed]: Filed August 21, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith the following original documents and papers in the file dealing with the action, together with minute entry of 6-4-56, as the record on appeal and cross-appeals to the United States Court of Appeals for the Ninth Circuit, at San Francisco, said papers being identified as follows:

1. Complaint, filed Oct. 4, 1954, with Exhibits A, B, and C attached.
2. Motion and Affidavit for Order to Show Cause, filed 10-6-54.
3. Order to Show Cause, filed Oct. 6, 1954.
4. Marshal's Return on Show Cause, and Summons, filed 10-11-54, Barnett, Owens and Ester.
5. Appearance of Gerald Shucklin for Deft. Geneva L. Pague, filed 10-12-54.
6. Marshal's Returns on Show Cause and Summons, Pague, Century Investment Corp., filed 10-13-54.

7. Marshal's Return on Summons, Ester, filed 10-14-54.

8. Appearance of Lycette, Diamond & Sylvester for defendants Pague, filed 10-14-54.

9. Appearance of Lycette, Diamond & Sylvester for Century Investment Corporation, filed 10-14-54.

10. Motion to Quash Order to Show Cause, filed 10-14-54.

11. Notice of hearing on above motion, filed 10-19-54.

12. Marshal's Return on Summons and Show Cause Order, Hartford Accident & Int. Co., Barnett, Owens, filed 10-19-54.

13. Motion and Affidavit for Continuance, filed 10-22-54.

14. Memo. of Defts. Pague on Motion to Quash, filed 10-22-54.

15. Appearance of Malcolm S. McLeod for Deft. Hartfort Accident and Indemnity Company, and Sherman, filed 10-26-54.

16. Appearance of Arthur G. Barnett and Alec Duff for defendants Barnett and Owens, filed 10-26-54.

17. Motion Deft. Barnett and Owens to Dismiss Complaint, filed 10-26-54.

18. Motion Defts. Virgil J. Pague, et ux., to Dismiss Complaint, filed 10-28-54.

19. Motion Century Investment Corporation to Dismiss Complaint, filed 10-28-54.

20. Return of Defendants Ester to Show Cause Order, filed 10-29-54.

21. Motion Defts. Ester to Dismiss, filed 10-29-54.

22. Motion Deft. Geneva L. Pague to Dismiss, filed 10-29-54.

23. Return of Hartford Accident & Ind. Co. to Order to Show Cause, filed 11-1-54.

24. Notice of Hearing Above Motions, filed 11-2-54.

25. Memorandum of USA, filed 11-3-54.

26. Return to Order to Show Cause of Virgil J. Pague, et al., filed 11-3-54.

27. Return of Century Investment Corp. to Order to Show Cause, filed 11-3-54.

28. Memo. of Defts. Pague on Order to Show Cause, filed 11-4-54.

29. Return of Defts. Owens, and Barnett to Show Cause, filed 11-5-54, with Exhibits A, B, C, D, E and F attached.

30. Memo. of Defts. Donald F. Owens, et ux., and Arthur G. Barnett, et ux., filed 11-5-54.

31. Return to Order to Show Cause of Geneva L. Pague, filed 11-5-54.

32. Defts. Ester's Memo. on Show Cause, filed 11-5-54.

33. Answer of Defendants Ester, filed 11-12-54.

34. Answer of Hartford Accident & Ind. Co., filed 11-12-54.

35. Answer of Defendants Pague, filed 11-12-54.

36. Answer of Century Investment Corporation, filed 11-12-54.

37. Answer of Deft. Geneva L. Pague, filed 11-12-54.

38. Answer, Defenses, etc., of Defts. Owens and Barnett, et al., filed 11-12-54.

39. Answer of A. E. Sherman, filed 11-13-54.

40. Order Discharging Rule to Show Cause and Denying Motions to Dismiss, filed 11-16-54.

41. Answer of United States of America to Cross-Claim of Defendants Pague, filed 12-23-54.

42. Answer of United States of America to Cross-Claim of Defendants Ester, filed 12-23-54.

43. Motion of Defendants Pague and Century Investment Corporation to Vacate Setting, filed 1-21-55.

44. Notice of hearing above motion, filed 1-21-55.

45. Notice of Defendants Ester to Renewal of Lease, filed 2-10-55.

46. Marshal's Return on Order to Show Cause With Motion and Affidavit, Jane Doe Sherman, filed 2-10-55.

47. Marshal's Return on Summons and Complaint, Jane Doe Sherman, filed 2-10-55.

48. Marshal's Return on Summons and Complaint, A. E. Sherman, filed 2-10-55.

49. Marshal's Return on Order to Show Cause With Motion and Affidavit, A. E. Sherman, filed 2-10-55.

50. Notice of Defendants Century Investment Corporation and Virgil J. Pague for taking Deposition and Oral Examination of Louis Michaelson, filed 3-31-55.

51. Marshal's Return on Subpoena, Louis Michaelson, filed 4-7-55.

52. Deposition of Louis Michaelson on Behalf of Defendants Century Investment Corporation and Pague, filed 5-17-55.

53. Request of Defendant Century Investment Corporation for Admissions, filed 5-24-55.

54. Praecipe of Defendants Barnett and Owens for Issuance of Subpoenas, Orville C. Hatch, et al., filed 6-8-55.

55. Return on Subpoena, Wayne V. Brandon, filed 6-10-55.

56. Return on Subpoena, R. M. Scougal, filed 6-16-55.

57. Return on Subpoena, Orville C. Hatch, filed 6-16-55.

58. Request of Defendants Barnett and Owens for Admissions, filed 8-12-55.

59. Request of United States for Admissions, filed 8-13-55.

60. Request of United States for Admissions, filed 8-13-55.

61. Request of United States for Admissions, filed 8-13-55.

62. Praecipe of United States for Issuance of Subpoenas, Orville Cohen and Albert Rontai, filed 8-16-55.

63. Praecipe of United States for Issuance of Subpoena, A. E. Sherman, filed 8-16-55.

64. Marshal's Return on Subpoena, A. E. Sherman, filed 8-22-55.

65. Marshal's Return on Subpoenas, Orville Cohen and Albert Rontai, filed 8-22-55.

66. Answer of United States to Request for Admissions, filed 8-26-55.

66a. Praecipe of United States for Issuance of Subpoena, Sumner Smith, filed 9-2-55.

66b. Trial Memorandum of Defendants Ester, filed 9-2-55.

67. Motion of United States to Amend Complaint, filed 9-6-55.

68. Notice of United States for hearing above motion, filed 9-6-55.

69. Order Authorizing Plaintiff to Amend Complaint, filed 9-7-55.

70. Motion of United States to Amend Complaint, filed 9-7-55.

71. Order Authorizing Plaintiff to Amend Complaint, filed 9-7-55.

72. Memorandum of United States of Legal Points and Authorities, filed 9-7-55.

73. Trial Memorandum of Defendants Pague and Century Investment Corporation, filed 9-7-55.

74. Praecipe of United States for Issuance of Subpoena, Virgil J. Pague, filed 9-9-55.

75. Marshal's Return on Subpoena, Sumner Smith, filed 9-12-55.

76. Marshal's Return on Subpoena, Virgil J. Pague, filed 9-13-55.

77. Memorandum and Statement of Points of Defendants Barnett and Owens, filed 9-13-55.

78. Praecipe of United States for Issuance of Subpoenas, Charles W. Ross and Louis Michaelson, filed 9-13-55.

79. Marshal's Return on Subpoena, Louis Michaelson, filed 9-14-55.

80. Supplemental Trial Memorandum of United States, filed 9-16-55.

81. Memorandum of Hartford Accident and Indemnity Company, filed 9-17-55.

82. Marshal's Return on Subpoena, Charles W. Ross, filed 9-21-55.

83. Statement of Costs of Defendants A. E. Sherman and Jane Doe Sherman, his wife, to be Taxed Against United States, filed 10-1-55.

84. Statement of Costs of Defendant Hartford Accident and Indemnity Company to be Taxed Against United States, filed 10-1-55.

85. Notice of Taxation of Costs, filed 10-1-55.

86. Objections by Defendants Pague and Century Investment Corporation to Government's Proposed Findings of Fact and Conclusions of Law, filed 10-12-55.

87. Objections by Defendants Barnett and Owens and Edward Ester to Plaintiff's Proposed Findings of Fact and Conclusions of Law, filed 10-19-55.

88. Findings of Fact and Conclusions of Law, filed 10-20-55.

89. Proposed Findings of Fact and Conclusions of Law of Plaintiff, filed 10-20-55.

90. Proposed Findings of Fact and Conclusions of Law of Plaintiff, filed 10-20-55.

91. Proposed Findings of Fact and Conclusions of Law of Defendant Pague, filed 10-20-55.

92. Proposed Findings of Fact and Conclusions of Law of Defendants Barnett and Owens, filed 10-20-55.

92a. Transcript of Oral Decision Sept. 17, 1955, filed 10-20-55.

93. Order Directing Reference and Appointing Special Master, filed 10-21-55.

94. Order on Stipulation, filed 10-31-55.

95. Report of Special Master, filed 12-16-55.

96. Memorandum Transcript of Proceedings Before Special Master, filed 12-27-55.

97. Motion of Defendant Virgil J. Pague to Strike Report of Special Master, filed 1-3-56.

98. Exceptions of Defendant Virgil J. Pague to Report of Special Master, filed 1-3-56.

99. Motion of United States to Confirm and Adopt Report of Special Master, filed 1-5-56.

100. Motion of United States to Fix Special Master's Compensation, filed 1-5-56.

101. Motion of Defendants Barnett and Owens to Strike Special Master's Report and Transcript, filed 1-5-56.

102. Exceptions of Defendants Barnett and Owens to Report of Special Master, filed 1-5-56.

103. Withdrawn by Court Order.

104. Motion of Defendants Century Investment Corporation and Virgil J. Pague to Strike Memorandum Transcript of Proceedings Before Special Master, filed 1-6-56.

105. Bulletin "F" of U. S. Treasury Department, Bureau of Internal Revenue, filed 1-6-56. (Later admitted as Plaintiff's Exhibit No. 37.)

106. Memorandum of Plaintiff in Support of Special Master's Report, filed 1-6-56.

107. Supplemental Report of Special Master, filed 1-18-56.

108. Exceptions of Virgil J. Pague to Supplemental Report of Special Master, filed 1-27-56.

109. Exceptions of Defendants Ester to Supplemental Report of Special Master, filed 2-1-56.

110. Objections by Defendants Barnett and Owens to Special Master's Original and Supplemental Report and Original Transcript filed Respectively, December 16, 1955, January 18, 1956 and December 27, 1955,—filed 2-1-56.

111. Reporter's Transcript of Proceedings Before Special Master on January 11, 1956, filed 2-23-56.

112. Motion of Defendants Barnett and Owens to Strike Special Master's Report, Transcript and Supplemental Report, filed 2-25-56.

113. Motion of Defendants Ester to Strike Special Master's Report, Transcript and Supplemental Report, filed 2-27-56.

114. Supplemental Memorandum—Transcript of Proceedings Before Special Master, filed 2-27-56.

115. Motion of Defendant Virgil J. Pague to Strike Supplemental Report of Special Master, filed 2-28-56.

116. Second Supplemental Memorandum—Transcript of Proceedings Before Special Master, filed 3-9-56.

117. Supplemental Objections of Defendants Barnett and Owens and Defendant Ester to Special Master's Reports, Including Second Supplemental Memorandum—Transcript of Proceedings Before Special Master Filed March 9, 1956—filed 3-23-56.

118. Memorandum of Plaintiff in Support of

Motion to Confirm Supplemental Report of Special Master, filed 4-12-56.

119. Affidavit of Don S. Griffith, filed 4-12-56.

120. Affidavit of Arthur G. Barnett, filed 4-19-56.

121. Affidavit of F. N. Cushman for United States in Opposition to Motion of Defendant Barnett, filed 4-19-56.

122. Second Supplemental Trial Memorandum of Plaintiff, filed 4-19-56.

123. Affidavit of Edward R. Ester, filed 4-19-56.

124. Supplemental Trial Memorandum of Defendants Barnett and Owens, filed 4-20-56.

125. Memorandum of Defendants Pague on Non-Payment of Taxes by Government, filed 4-20-56.

126. Order Overruling Objections and Confirming Supplemental Report of Special Master, filed 4-21-56.

127. Supplemental Findings of Fact and Conclusions of Law, filed 4-26-56.

128. Judgment and Decree, filed 4-26-56.

129. Excerpt of Proceedings by Court Reporter on 4-21-56, filed 5-1-56.

130. Motion of Defendants Barnett, Owens and Edward R. Ester to Alter or Amend Judgment and Decree, filed 5-7-56.

131. Affidavit of Arthur G. Barnett in Support of Motion of Defendants Barnett, Owens and Ester to Alter or Amend Judgment and Decree, filed 5-7-56.

132. Memorandum in Support of Motion of Defendants Barnett, Owens and Ester to Alter or Amend Judgment, filed 4-7-56.

133. Notice of hearing Motion of Defendants Barnett, Owens and Ester to Alter or Amend Judgment and Decree, filed 5-7-56.

134. Memorandum of Plaintiff in Opposition to Defendant's Motion to Alter or Amend Judgment and Decree, filed 6-1-56.

135. Notice of Appeal by United States, filed 6-25-56.

136. Notice of Appeal of Defendants, Century Investment Corp., and Virgil J. Pague, filed 6-27-56.

137. Cost Bond on Appeal of Defendants Century Investment Corporation and Virgil J. Pague, filed 6-27-56.

138. Notice of Cross-Appeal of Defendants Arthur G. Barnett and Donald F. Owens, filed 6-17-56.

139. Motion of Defendants Arthur G. Barnett and Donald F. Owens to Extend Time for Filing Record on Appeal and Docketing Appeal, filed 7-17-56.

140. Affidavit of Arthur G. Barnett, filed 7-17-56.

141. Notice of Defendants Owens and Barnett of hearing Motion to Extend Time for Filing Record on Appeal and Docketing Appeal, filed 7-17-56.

142. Notice of Cross-Appeal of Defendants Edward R. Ester and the Marital Community Composed of Him and Lorraine M. Ester, filed 7-17-56.

143. Cost Bond on Appeal of Defendants Barnett and Owens, filed 7-17-56.

144. Cost Bond on Appeal of Defendants Ester, filed 7-17-56.

145. Motion of United States to Dismiss Appeal, filed 7-18-56.

146. Notice of United States of hearing Motion to Dismiss Appeal, filed 7-18-56.

147. Affidavit of Defendant Edward R. Ester Opposing Plaintiff's Motion to Dismiss Appeal and Affidavit in Support Thereof, filed 7-20-56.

148. Substitution of Vernon W. Towne in place of Robbins and Robbins as attorney for Defendants Ester, filed 7-20-56.

149. Affidavit of Defendant Arthur G. Barnett Opposing Plaintiff's Motion to Dismiss Appeal and Affidavit in Support Thereof, filed 7-20-56.

150. Amended Notice of Appeal of Defts. Barnett, Owens and Ester, filed July 31, 1956.

151. Designation of Contents of Record on Appeal filed July 31, 1956, by Defts. Barnett, Owens and Ester.

152. Statement of Points on Appeal, Barnett, Owens and Ester, filed July 31, 1956.

Minute entry of June 4, 1956, re hearing on motion of Barnett, Owens and Ester and Court's own motion amending judgment and order denying all pending motions.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellant for preparation of the record on appeal in this cause, to wit, Notice of Appeal, $5.00; and that said amount

has not been paid to me for the reason that the appeal is being prosecuted by the Government.

I further certify that the costs incurred by cross-appellants are as follows:

Lycette, Diamond & Sylvester for filing Notice of Appeal on behalf of Century Investment Corporation and Virgil J. Pague	$5.00
Arthur G. Barnett, Cross-Appeal self and Ester	5.00
Arthur G. Barnett, amended Notice of appeal, Defts. Barnett, Owens and Ester, jointly	5.00

and that said amounts have been paid to me by the respective parties through their attorneys.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 31st day of July, 1956.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I am transmitting herewith, supplemental to the original record on appeal herein the following papers in the file dealing with the action, to wit:

153. Bond on Appeal, (Barnett and Owens), $3,000.00, filed 8-21-56.

154. Bond on Appeal, (Ester), $2,500.00, filed 8-21-56.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 22d day of August, 1956.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 15219. United States Court of Appeals for the Ninth Circuit. Century Investment Corporation and Virgil J. Pague, Appellants, vs. United States of America, Appellees. Arthur G. Barnett and Virginia N. Barnett, His Wife; Donald F. Owens and Jean Owens, His Wife; Edward R. Ester and Lorraine M. Ester, His Wife, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed August 1, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15219

UNITED STATES OF AMERICA,

Appellant,

vs.

CENTURY INVESTMENT CORPORATION, et al.,

Appellees.

STATEMENT OF POINTS ON APPEAL OF CENTURY INVESTMENT CORPORATION AND VIRGIL J. PAGUE

Century Investment Corporation and Virgil J. Pague will rely upon the following points in this appeal:

1. The Court erred in awarding damages against these Appellees in the absence of any competent proof of damage.

2. The Court erred in ordering an accounting.

LYCETTE, DIAMOND & SYLVESTER,

By /s/ LYLE L. IVERSEN,
Attorneys for Century Investment Corporation and Virgil J. Pague.

[Endorsed]: Filed August 9, 1956.

[Title of Court of Appeals and Cause.]

At a Stated Term, to wit: The October Term 1956, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the fourteenth day of August in the year of our Lord one thousand nine hundred and fifty-six.

Present: Honorable William E. Orr, Circuit Judge, Presiding,

Honorable Thomas McAllister, Circuit Judge;

Honorable Stanley N. Barnes, Circuit Judge.

No. 15219

ORDER DISMISSING APPEAL, ETC.

The United States of America has moved this Court to dismiss its appeal. Appellee and cross-appellant Edward R. Ester has filed an affidavit opposing said motion on the ground that said motion is unsupported by a substantial reason for dismissal We think the determination by the Attorney General of the United States that further prosecution of the appeal is not desirable is sufficient. Affiant Ester also moves dismissal because the motion is not supported by affidavit. We think the affidavit, filed August 9, 1956, may be considered in support of the motion and thus meet the requirements of Rule 17 of the rules of this court.

The Motion to Dismiss Is Granted

Appellees and cross-complainants Barnett, Owens and Ester have moved this court that in the event the motion of the United States of America to dismiss its appeal is granted, that a supersedeas bond be dispensed with or that this court fix the amount of such bond. We think separate supersedeas bonds should be furnished; cross-appellant Ester and wife to furnish bond in the sum of $2,500.00, and cross-complainants Barnett and his wife and cross-complainant Owens and his wife to jointly furnish a supersedeas bond in the sum of $3,000.00; said supersedeas bonds to be conditioned as required by law, to be approved by the United States Attorney for the Western District of Washington, and the Judge of said District Court and filed with the Clerk of said District Court.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL BY JOINT APPELLEES AND CROSS-APPELLANTS EDWARD R. ESTER, DONALD F. OWENS AND ARTHUR G. BARNETT

Joint appellees and cross-appellants, Edward R. Ester and Lorraine M. Ester, his wife, Donald F. Owens and Jean Owens, his wife, and Arthur G. Barnett and Virginia N. Barnett, his wife, herewith present the points upon which they claim the District Court erred:

1. In denying defendants' motions to dismiss the complaint on the ground that the plaintiff failed to state a claim upon which relief can be granted.

2. In failing to dismiss the action because of failure to prove a claim upon which judgment could be based.

3. In entering Findings of Fact and Supplementary Findings of Fact which are inconsistent with the Conclusions of Law and Supplementary Conclusions of Law, and which fail to support the judgment based thereon.

4. In refusing to enter a judgment of dismissal as to these defendants based on the Findings of Fact and Supplementary Conclusions of Law.

5. In assessing damages against these defendants, who are fee owners of the land, based on an accounting of rents from property which had theretofore reverted to them.

6. In making a reference to a Master and in assessing a portion of the Special Master's fee against these defendants.

7. That the Findings of the Special Master are clearly erroneous as to these defendants; that the portion of the Special Master's fee assessed against these defendants is excessive and no fee at all was justified against these defendants because of the Master's erroneous work.

8. In assessing against these defendants, who were not parties to the contract, and who are the

fee owners of the underlying real estate, judgment for damages in the same manner as against:

(a) Parties to the contract;

(b) The alter ego of parties to the contract; and

(c) Defendants who never were and are not now owners of all the real estate underlying their buildings.

ARTHUR G. BARNETT, and
ALEC DUFF,

By /s/ ARTHUR G. BARNETT,
Of Attorneys for Arthur G. Barnett and Donald F. Owens.

/s/ VERNON W. TOWNE,
Atty. for Edward R. Ester.

Receipt of copy acknowledged.

[Endorsed]: Filed August 30, 1956.

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SUPREME COURT, U. S.

FILED
MAR 22 1958
JOHN T. FEY, Clerk

No. 873

In the Supreme Court of the United States

OCTOBER TERM, 1957

EDWARD R. ESTES and LORRAINE M. ESTES, his wife; DONALD F. OWENS and JEAN OWENS, his wife, and ARTHUR G. BARNETT and VIRGINIA N. BARNETT, his wife,

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

and

MOTION FOR SUMMARY REVERSAL

ARTHUR G. BARNETT, Esq.
VERNON W. TOWNE
ALEC DUFF
Counsel for Petitioners
1304 Northern Life Tower
Seattle 1, Washington

No.

In the Supreme Court of the United States

OCTOBER TERM, 1957

EDWARD R. ESTER and LORRAINE M. ESTER, his wife; DONALD F. OWENS and JEAN OWENS, his wife, and ARTHUR G. BARNETT and VIRGINIA N. BARNETT, his wife,

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In the Supreme Court of the United States

OCTOBER TERM, 1957

EDWARD R. ESTER and LORRAINE M. ESTER, his wife; DONALD F. OWENS and JEAN OWENS, his wife, and ARTHUR G. BARNETT and VIRGINIA N. BARNETT, his wife,

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

and

MOTION FOR SUMMARY REVERSAL

(It is earnestly requested that the Motion for Summary Reversal, Page 30 of this petition be read at this point.)

Petitioners pray that a writ of certiorari issue to review the judgment and opinion as amended, and pray for summary reversal of that portion of the judgment remanding the case to the district court to construe the findings or for a new trial.

OPINIONS BELOW

The opinion of the circuit court of appeals is reported in 250 F.2d 139. Judgment of the district court was not reported but is set forth in the record, together with findings of fact and conclusions of law and amendatory supplemental findings of fact and conclusion of law (R. 62-81; 107-117).

JURISDICTION

The judgment and opinion of the circuit court of appeals was first entered on October 30, 1957 (R. 148-156; 157). On petitioners' motion to correct or amend opinion (R. 158-166), the circuit court entered an order amending its opinion and denying petition for rehearing (R. 167, 168-169) on December 23, 1957. Jurisdiction of this court is involved under Title 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS, ETC.

1. Fifth Amendment to the Constitution of the United States:

   " . . . ; nor shall private property be taken for private use, without just compensation."

2. Lanham Act, as amended, 54 Stat. 1125, 42 USCA 1521, Oct. 14, 1940, Public Law 849:

   "Sec. 1. In order to provide housing for persons engaged in national-defense activities . . . in these areas . . . in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Federal

Works Administration is authorized:

(a) " . . . to acquire lands or interests in lands by . . condemnation."

"Sec. 4. "When the President shall have declared that the emergency declared by him on Sept. 8, 1939, to exist, has ceased to exist (2) the authority contained in Section 1 hereof shall terminate . . ., and (b) property acquired or constructed under this Act shall be disposed of as promptly as may be advantageous under the circumstances and in the public interest."

3. National Emergency Proclamation No. 2352, Sept. 8, 1939 (54 Stat. 2634):

" . . . I, . . . President of the United States of America, do proclaim that a national emergency exists in connection with and to the extent necessary for the proper observance, safeguarding and enforcing the neutrality of the United States and the strengthening of our national defense within the limits of peace-time authorizations . . ."

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is error for the lower court to remand the question of exclusive possession which is settled by the findings of fact (R. 107-108, Fdgs. I & II) and which was an issue arising on an averment (R. 8, par. VIII) and denial (R. 25, par. VIII; R. 40, par. VII) and which issue in the first findings was in favor of the plaintiff, then reversed in favor of the petitioners in supplemental and amendatory findings.

2. Whether an option to renew from year to year, condemned together with an estate for one year under the

Lanham Act (54 Stat. 1125), has lapsed, together with the estate, as a matter of law, under findings that annual rentals decreed as just compensation have not been proved paid and that the court cannot find that they have been paid.

3. Whether in view of the findings that the government failed to prove that just compensation has been paid and that the Court "cannot find" that such compensation has been paid (R. 107-108), the lower court has erred as a matter of law in stating "It may be that the government was not prompt in completing its payments for previous months or years. But, if such payments were ultimately made the government's exclusive right of possession during such period, . . . would seem to be established" (R. 169), where the term was for one year, with the right to renew from year to year, and the owners have repossessed and the finding of the trial court applied to "at all times material to the action."

4. Whether under the Fifth Amendment to the Constitution, prohibiting the federal government from taking private property without just compensation, petitioners as owners of land can be made liable for damages, or for reasonable rent, to the federal government for the use of the land, where the findings are (1) that the government failed to prove its right to exclusive possession thereof at all times material to the action by the payment of just compensation, and (2) that the court cannot find that the government did pay just compensation as decreed for a term of one year, with an option to renew from year to year (R. 107-108), and (3) that petitioners were the owners of the lands in question

(R. 68, Introd.); and where the land and improvements revert as a matter of law for failure to renew before termination as provided in the stipulation and condemnation judgment based thereon?

STATEMENT

The jurisdiction of the court of first instance was based on Title 28 U.S.C. 1345 because the plaintiff United States was a party.

The court below on petitioners' appeal reversed money judgments against the petitioners on the ground that the judgment of the trial court was not supported by the findings of fact in that petitioners were not privy to the contract sued upon. However, the petitioners claim error because the circuit court remanded for the trial court to determine whether petitioners might be liable in damages as trespassers for possible periods in which the government might have had the exclusive right of occupancy, or on the theory of an implied contract to pay a reasonable rental value of the lands "either by construing the findings in the record or by proceeding to another trial, as may be thought proper . . . " Petitioners claim that the lower court has committed error because supplemental findings I and II make it unmistakably clear that the government had failed to prove its right of exclusive possession of said lands (R. 107-108, Fdgs. I and II), "at all times material to this action."

The only statement of the case needed, therefore, will be of the facts material to the consideration of whether or

not the record fairly and directly, considers the issue of the government's right to exclusive possession of the land, to quote the lower court, "during any of the time" when the petitioners owned the houses situated thereon, and whether or not the findings of fact are clear and direct and without ambiguity in disposing of this issue. On this the lower court said "We are not certain that this is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the question of whether or not specific performance should be ordered. With regard to this only the government's immediate right to exclusive possession at the time the matter was before the court was important . . . "

The trial court entered two sets of findings, one on Oct. 20, 1955 (R. 62-74) wherein it found that petitioners (defendants below) had "at all times material to this action" interfered with the government's exclusive use acquired by condemnation; that the government has "continuously held the exclusive use" its term extending to Feb. 21, 1956 (R. 63-64, Fdg. II); that it acquired its right to exclusive use by the Judgment on Declaration of Taking entered June 16, 1945, and by subsequent Judgments Fixing Compensation, and was granted the right to renew said exclusive use. The government's exclusive use is repeated in Findings XIII, XIV, and XV (R. 71-73). The court allowed damages for wrongful use of the land (R. 80, Concl. XII).

By supplemental findings of fact entered April 26, 1956, the trial court reversed these findings on the matter of exclusive possession as follows:

FINDINGS OF FACT
I (R. 107-108)

(a) "That it was incumbent upon the plaintiff to prove its exclusive right of possession of the land upon which the buildings have, *at all times material to this action*, been and are now located. (Emphasis added)

II (R. 108)

"That the plaintiff has not fully sustained its burden, in that, although the judgment on the declaration of taking and the judgment awarding just compensation were valid, the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid; therefore, the Court cannot find that such installments have been paid and accordingly the Court now finds that the plaintiff is not entitled to the requested order that the defendants be specifically compelled to remove said buildings and clear the sites upon which they stand. This finding is based upon the necessity of the plaintiff establishing, in this action, its exclusive right of possession of said real estate."

emphasis is given to the phrase " . . . at all times material to this action . . . " inasmuch as the court stated in its order amending opinion (R. 168) that there would be no damages due on the theory of trespass or an implied contract to pay a reasonable rental value of the land,

> " . . . if the government did not have the exclusive right of possession of the land during any of the time when these appellants owned the houses . . . " (Amended Order, R. 168).

The phrase of the lower court "during any of the time" is in direct conflict with the following language of the findings

> " . . . at all times material to this action" (R. 108, Fdg. 1)

The government's right to exclusive possession at all times mentioned included all of the time when petitioners owned the houses located on the lands involved. As shown above this issue was once decided in favor of the government and then reversed and found in favor of petitioners. Examination of the pleadings upon which the issues were raised and evidence submitted, considered by the court and in the record shows the following:

The government pleaded (R. 8, par. VIII) its right to exclusive use of the land *at all times mentioned herein*. The times pleaded included the "period" petitioners rented (R. 7, par. VI), and the prayer included (1) an accounting *by all parties* of funds collected from tenants "by reason of the authorized use of said temporary buildings *and the land* upon which they are situated," and (2) for the allowance of a reasonable rental value to the government for said property (R. 9, items 4 & 5).

Petitioners' answers denied the government's alleged right to exclusive use (as to petitioner Ester, R. 25, par. VIII) and by paragraph VI Ester's answer admitting he was renting

the buildings situate on the lands described in plaintiff's par. IV. and admitted in Ester par. IV., Ester's Fifth Defense (R. 26) was that compelling him to remove the buildings would be a violation of his constitutional rights without due process of law. Ester's cross-complaint (R. 31, par. II) asserted his legal ownership of and right to use of the said lands and that the government has no right, title or interest to the use and possession thereof.

As to petitioners Barnett and Owens, their answer denied the government claim to exclusive use (R. 40, par. VII); admitted they were renting apartments on the lands described; in the Fourth Defense, they alleged that the government had abandoned the land involved and that the government had attempted to renew its leases from time to time in a manner not authorized by law; (R. 41). The Fifth Defense (R. 43) pleaded that the government was attempting to deprive them of their property without due process of law.

Supplemental findings I and II make no reference to the matter of specific performance of the contract also pleaded by the government.

Supplemental finding III states "That the present and only estate in the land here in question now claimed by the plaintiff expires on July 1st, 1956 . . . " (R. 108). The use of the words "now claimed" did not abrogate the previous two findings in which the trial court found that the government had failed to establish its exclusive right of possession of the real estate, and that it had failed to prove payment

of annual rentals decreed as just compensation (R. 107-108). Nevertheless, the circuit court committed error in stating in footnote 3 (R. 149) that "The government subsequently terminated its use as of June 30, 1956." In view of supplemental findings I and II, how could the government terminate the use which the findings said the government did not have? (Parenthetically, there is no finding of termination as of June 30, 1956. This was a self-serving statement de hors the record in the government's appeal brief below and objected to below by petitioners.) As to petitioners' property, the government's estate terminated as a matter of law by its failure to pay just compensation for its annual rental, and with it the right to the option to renew also lapsed.

To the extent that any further statement of the case is necessary, the following is offered. The record includes the complaint (R. 3-10) of the government and the answers (R. 24-32; R. 39-48) of the petitioners and all the findings referred to above. Not the least important is the report of the Special Master (R. 87), making an accounting of the rental income of petitioners Barnett and Owens for a period prior to the commencement of the action, to-wit, on and after June 1st, 1954, and as to petitioner Ester (R. 89) for the period commencing May 1st, 1954, said report having been approved and confirmed by the trial court (R. 107, introduction). The court took judicial notice of the original condemnation in 1945 and the continuous exclusive possession of the government in its first findings through to Feb. 21,

1956 (R. 70, Fdg. XII) and this necessarily included the period of time when the houses were acquired and situate upon the land, to-wit, Jan. 20, 1954 as to Barnett and Owens (R, 70c) and Nov. 19, 1953 as to Ester (R. 70d). It would seem unnecessary to spell out these dates inasmuch as the supplemental findings (R. 107-108, Fdgs. 1 and 11) held that the government had failed to sustain the burden of proof that it was entitled to exclusive possession of the "lands upon which the buildings, . . . have, at all times material to this action, been and are now located." When the trial court reversed its findings, the government did not ask for a new trial. It was the first of the parties to appeal but withdrew its appeal over objections of these petitioners argued to the court below (R. 142).

It should not be necessary to go behind the findings but for convenience excerpts from the Declaration of Taking and Judgments on Declaration of Taking, and from subsequent Judgments Fixing Compensation are in appendix.

REASONS FOR GRANTING THE WRIT AND FOR GRANTING SUMMARY REVERSAL

1. The court below has so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this court's power of supervision, in that the lower court has disregarded plain findings. It has remanded for the trial court to construe its own findings of fact. The

findings being clear, the circuit court is delegating its appeal function back to the very court from which the petitioners took their appeal.

"A cause will not be remanded to the court of claims for amended findings where the findings are direct, free from ambiguity, consistent, fully responsive to the issues, and contain nothing indicating that they are ill founded in point of law" Syl. 5 *Luckenbach S.S. Co. v. U.S.*, (1926) 272 U.S. 533, 47 S. Ct. 186, 71 L. ed. 394.

"The fact having been established, against the presumption mentioned, that the trustees never conveyed the premises or any part thereof to the plaintiff, the title remains in them, and with it the right to possession. Judgment should, therefore, have been ordered for the defendants." *Lincoln v. French*, 105 U.S. 614, 26 L. ed. 1189. This case is cited in the U.S. Supreme Court Digest, Vol. 2, Appeal and Error, § 1702, Entry of proper judgment, as follows:

> j. When a circuit court, on the trial of an action at law without a jury, makes a specific finding of fact on all the issues raised by the pleadings, and gives an erroneous judgment thereon the Supreme Court, on reversal, should direct such judgment to be entered by the Circuit Court as the specific finding requires.

"All the facts of the case being ascertained by the special findings of the court below, as they would be by the special verdict of a jury, there is no reason for awarding a new trial, but there must be a general Judgment for the de-

fendants." *Allen v. St. Louis Natl. Bank*, 120 U.S. 20, 7 S. Ct. 460, 30 L. ed. 573 at 578 (1887). This case was used as a precedent in *Cleveland Rolling Mill Co. v. Rhodes*, 121 U.S. 255, 7 S. Ct. 882, 30 L. ed. 920 at p. 923:

> "It conclusively appearing, upon the facts found by the court below, that the original plaintiffs cannot maintain their action, it is ordered, in accordance with the precedents of *Fort Scott v. Hickinan*, 112 U.S. 15, and *Allen v. St. Louis Nat. Bank*, 120 U.S. 20, that the Judgment be reversed, and the case remanded to the Circuit Court with directions to enter judgment for the original defendants."

Supplemental findings I and II are so clear that they do not come within the rule of:

> "Where the special findings of fact are too imperfect to enable the court to direct judgment for either party, the judgment will be reversed and the cause remanded for a new trial," quoted from Syl. 2, *Saltonstall v. Birtwell*, 150 U.S. 42, 37 L. ed. 1128, 14 S. Ct. 170.

> "Confessedly, the court has found all the facts which have been directly established by the evidence . . . The inquiry thus presented is as to the legal effects of facts proved, . . . ", and "The rules relieves us from the necessity of considering the evidence at all and confines our attention to the legal effect upon the rights of the parties of the facts proven as they have been sent up from the court below. In this way the . . . ultimate effect of the facts, which the direct evidence has established, is left open for review here on appeal" *U.S. v. Pugh*, 199 U.S. 265.

The clear findings are substituted by the following conjectural statement from the opinion of the lower court:

> "It may be that the government was not prompt in completing its payments for previous months or years. But if such payments were ultimately made, the government's exclusive right of possession would seem to be established."

But this court said in *Sun Mutual Life Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, 27 L. ed. 337:

> "The question, and only question, which we can consider is whether the facts found support the conclusion of law and the decision . . . The findings of fact, being in the nature of a special verdict, we can go neither behind them nor beyond them. We cannot correct them by inquiring into the evidence nor supply any omissions by intendment or inference."

It is a far departure from accepted judicial proceedings for a lower court to substitute conjecture for the positive findings of the trial court. It exposes petitioners to the unnecessary expense of a trial and appearances before the trial court.

Sun Mutual Life Ins. Co. v. Ocean Ins. Co., 107 U.S. 485, 27 L. ed. 337, at syllabus 2, also states:

> "A determination of the questions of law arising upon the record may be predicated of facts which appear in any part of it, whether admitted by the parties in the pleadings, or by stipulation or found by the court."

In *U.S. v. King*, (1849) 7 Howard 833, at 847, at 854 in reversing, this court said that although no statement of facts was filed until after the appeal:

> " . . . The facts upon which the question of title arises are as fully before us as if they had been set forth in the form of a case stated . . .
>
> " . . . the question in the Superior Court necessarily is whether the judgment of the court below was erroneous or not upon the facts before it, as they are certified in the record . . . "

Petitioners feel that the remand was not upon the facts before the lower court in the findings of fact, and that the lower court substituted conjecture.

Petitioners sought by Petition for Rehearing and Motion to Alter or Amend (R. 158-166) to correct a mistake appearing on the face of the opinion of the lower court where it was stated that the government had not proved that it had paid just compensation which it was obligated to pay to entitle it to continued exclusive possession of the tracts in question and that the government had not fully sustained its burden of proving its continued exclusive right to possession of the land in question (R. 151, last par. to R. 152), and then, by way of contradiction, to state that the cause should be remanded for a new trial on the question of whether these appellants are liable in damages as trespassers upon lands "on which the government had the exclusive right of occupancy, . . . " To this the lower court responded in its order amending opinion (R. 168-169) but committed error by seeking to restrict supplemental finding I and II (R. 107-108) of the lower court to the matter of specific performance instead of recognizing that said findings applied

to the issue of exclusive possession pleaded, and denied, and were fully disposed of by said findings I and II, and which in no way were involved with the issue of specific performance. It is crystal clear that had the government proved its right to exclusive possession, then the petitioners would have had to move the buildings even if they were not parties to the contract; this of course was exactly the case in the original findings where petitioners were ordered to move the buildings but, as first discussed herein, said findings were reversed.

In fact, supplemental finding II states:

> "The Court now finds that the plaintiff is not entitled to the requested order that the defendants be specifically compelled to remove said building and clear the sites upon which they stand,"

because, as set forth in finding II, plaintiff had failed to prove payment of just compensation, the court could not find compensation had been paid, and the court said:

> "This finding is based upon the necessity of the plaintiff establishing, in this action, its exclusive right of possession of said real estate."

The issue of exclusive possession did not cease to be an issue merely because the court reversed its original finding.

Petitioners now ask the indulgence of this court in their use of parenthetical statements interpolated within quoted excerpts from the amended opinion of the lower court because the claimed errors occurred almost clause by clause. The lower court stated that the petitioners would not be liable to the government (R. 168)

"if the government did not have the exclusive right of possession of the land during any of the time when these appellants owned the houses . . . "

"We are not certain that this is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the question of whether specific performance should be ordered" (petitioners parenthetically call the attention of the supreme court to the fact that the preceding sentence is an inadvertent misstatement inasmuch as supplemental findings I and II (R. 107-108) had nothing to do with specific performance but were solely connected with the government's right of exclusive possession. And, as pointed out, supplemental finding III, which deals with specific performance, only indirectly concerns itself with the government's right of exclusive possession in terms of what the government "now claimed"). "With regard to this, only the government's immediate right to exclusive possession at the time the matter was before the court was important" (we again state parenthetically that supplemental finding I was directed to "at all times material to this action." The time went back to Feb. 21, 1945, the time of the original condemnation; and continued from year to year thru the subsequent judgments on condemnation, all dealing with the government's right of exclusive possession; the times also included the dates of the contract sued upon. The court necessarily had to be concerned with all of the times since the government alleged its right to exclusive possession "at all times herein mentioned" R. 8, par. VIII of the government's complaint.) "It may be that the government was not prompt in completing its payments for previous months or years but if such payments were ultimately made, the govern-

ment's exclusive right of possession during such period, at least as against these appellants, would seem to be established." (R. 168-169)

The concluding portion of finding III (R. 108) shows that it is directed solely to the matter of specific performance of the contract sued upon.

> " . . . to, instead of compelling specific performance of removal and site clearance, require the defendants to pay a fair, reasonable, and just compensation by way of damages for their failure to remove and clear the sites of and for their wrongful commercial use of, said buildings and comply with all of the requirements of the contract of sale." (R. 109)

It is noted at this point that the findings say nothing about the government not being prompt. The findings definitely state that the government did not prove its right to exclusive possession, and did not prove it had paid just compensation, and that the court could not find that the government had paid compensation. The substitution of conjecture by the lower court for the facts established by the findings is clear error.

2. The lower court has committed error as a matter of law in ignoring the findings that the government had not proved payment of, and had not paid, just compensation as decreed, the lower court substituting its theory that " . . . if such payments were ultimately made, the government's exclusive right of possession . . . would seem to be established." This is in violation of the Fifth Amendment to the Constitution (page 2) prohibiting the federal government from

taking private property without just compensation. It is also in violation of the rules of evidence in that if the government fails to prove its right to exclusive possession and does not ask for a new trial, and does not appeal, then the fact found should not be substituted for by a theory of ultimate payment. Furthermore, this was not a taking in fee but a temporary use requiring an annual rental to be paid for a one-year tenancy with an option to renew from year to year.

In this respect, the lower court has by ignoring the clear findings decided an important federal question not hitherto decided, namely, that an option to renew and the estate term would not terminate as a matter of law under the trial court's findings I and II (R. 107-108) that the government had not proved its right to exclusive possession of the land in question and that it had not proved payment of annual rentals decreed as just compensation, and that the court could not find that such just compensation had been paid. The estate was condemned under the Lanham Act (R. 54, Stat. 1125) (page 2) for one year commencing February 21, 1945 (Appendix 5) (R. 71) together with an option to renew from year to year without the owner's consent but not beyond three years after the termination of the National Emergency declared to exist by the President on Sept. 8, 1939, (page 3); the owners were in possession and had codified to conform to the City of Seattle Building Code requirement (Rdg. XV, R. 73), and were renting the premises (Fdg. X, R. 68).

The applicability of the basic law of landlord and tenant to the sovereign in such a case is an important question which petitioners believe has not been decided before by this court although it is shown later herein that the government has been made subject to the law of landlord and tenant under a leasehold term. Ancillary to the above two questions is a further question which the petitioners feel has not been decided before, namely whether the circuit court may ignore the trial court finding that compensation was not paid and substitute therefor the circuit court's theory that "if such payments were ultimately made" the government might have exclusive possession for certain periods (see amended opinion of lower court, R. 169).

> "Where there is a delay in the payment of a condemnation judgment it cannot reasonably be said that its payment at some later date will amount to just compensation because the owner in such case is deprived of the full and beneficial use and enjoyment of his property without legal process or compensation." *Feldman v. Chicago*, 363 Ill., 247, 2 N.E. 2d 102.

That the government may "ultimately" pay just compensation, which the trial court found was not paid, introduces a new doctrine in condemnation law. Even under a Declaration of Taking the government is required to make a reasonably estimated deposit in advance or at the time of taking. After judgments of just compensation have been entered upon stipulations between the parties, decreeing the amount of annual rent for a one-year term together with the

right to renew, the government is no different than any other tenant whose term is forfeited, or found not "in being" for failure to prove payment of the rents. The government condemned and elected to take a short term so as to be able to control and liquidate its obligations; it has provided for repayment to itself of prepaid rents and taxes (Appendix 7). What remedy has the owner against the sovereign? Only the well defined rules of landlord and tenant, the Constitution of the United States, and the law of eminent domain, and, in this case, the findings.

Why condemn an estate of one year with option to renew and set conditions, if compliance therewith is not required or important? The government's estate was a determinable one. In addition, its condemnation purposes were abandoned as is evidenced by the termination by the City of Seattle of the government's right to use city areas underlying the buildings, and the grant to petitioners to use said areas (R. 72-73, Fdg. XV).

In addition to the matter of the forfeiture of the right to exercise the option is whether or not the term lapsed because of the failure to pay annual rent.

3. That this court has not decided the option question involved herein is indicated by the discussion of the court in *U.S. v. Westinghouse*, 70 S. Ct. 644, and the dissent therein by Justice Jackson.

The judgment of just compensation required a payment each year for the option to renew as well as for the one-year exclusive use. In the absence of proof of payment of just compensation, it would appear clear that the U.S. would take nothing. It could not have a perpetual "taking"; rather, it was a loss of a determinable estate. In *U.S. v. General Motors Corp.*, 323 U.S. 374, p. 377, ftn. 3, it was stated that there is a value which must be paid for such an option as the one in the instant case.

> " . . . the State never got title, since the requisite compensation was never made." *Kennedy v. Indianapolis*, 103 U.S. 599, 606, 26 L. ed. 550.

The Indiana statute there involved did not state at what stage of the proceedings the owner's title should be divested but since he was not paid he retained title and stopped an attempted sale of his property by the state.

In the instant case there is likewise no provision for divestment of the government's exclusive use except its unilateral right to terminate on 60 days' notice; the provision for the owners' consent three years after termination of the national emergency was circumvented by extending the emergency into another emergency by the Emergency War Powers Acts[2].

The judgments fixing just compensation were final judgments not subject to modification or change, and the term and the option to renew were dependent upon compliance therewith, namely the payment of the annual rent decreed

as just compensation for a term to begin Feb. 21 of each year and which the findings II (R. 108) states was not paid.

The lower court could not vary the terms of the condemnation judgment and allow compensation payments not made to be "ultimately" paid for previous "months" or "years." *City of Des Moines v. Des Moines Water Co.*, 218 F. 939[1], is authority for the proposition that where a court has fixed the time for payment in a condemnation case there is no jurisdiction after the term to modify the judgment so as to extend the time, especially so when entered upon stipulation.

Where a government lease (not a condemned lease) expired without the government removing structures which it had the right to remove before expiration, ownership of the structures reverted with the land to the landowner. On a subsequent condemnation of the same land and structures the government was compelled to pay just compensation for the structures which it had erected. The government had had an option to purchase but it did not exercise it by compliance with the conditions and had defaulted for nonpayment of rent in *U.S. v. Certain Parcels, etc. v. Outer Harbor Dock &*

Syl. 2. "Where the court, as a part of a judgment fixing an award for a private water works system in a proceeding by a city to condemn the same, fixes the time for payment, it had no jurisdiction after the term to modify the judgment, so as to extend the term."

Syl. 3. "Where a decree was rendered by consent, entitling the city to acquire a privately owned water works system by condemnation on payment of a specified sum, the court did not modify the decree so as to extend the time for payment, without the consent of both parties.

Wharf Co., et al, 131 F. Supp 65. An involuntary condemned lease dependent upon compliance with a just compensation judgment should be as strictly construed as a non-condemnation lease.

Property may be recovered and "ejectment will lie where the condemning party fails or refuses to pay the compensation assessed . . . or by reason of expiration of the license, or lease under which entry was made . . . " *30 CJS, Eminent Domain,* p. 109, Sec. 397.

The decision of the circuit court comes in conflict with *U.S. v. Lee,* 106 U.S. 191, 1 S. Ct. 240, 27 L. ed. 171, which granted ejectment against the agents of the government. *Lee* was recently interpreted by this court as follows:

> " . . . if title had been in the plaintiff the taking of the property by the defendant would be a taking without just compensation, and, therefore, an unconstitutional action . . . for that reason, the suit for specific relief, to obtain the property . . . could be maintained . . . ", *Larson v. U.S.* 337 U.S. 682, 69 S. Ct. 1457.
>
> "If in the proceeding here, or in any condemnation proceeding where the judgment was given in the exact language of the declaration here, but the United States deposited only the rental value for one year and paid nothing for a property interest attempted to be created by such language for an additional period, the United States could hold only for one year under the judgment. *It is axiomatic that the United States will obtain only the exact property for which 'just compensation' has been paid no matter what the recitals of the judgment.*

An attempt to exercise the so-called option would be invalid. At the end of the year the landowner would be entitled to maintain ejectment notwithstanding the inclusion of such language in its judgment." *United States v. Crown-Zellerbach Corp.*, 60 F. Supp. 853, 860. (Emphasis added)

There is no need for ejectment here because Barnett, Owens and Ester are now the owners of the fee title and are in possession of the real estate.

"The United States is required to pay just compensation for the property taken and if just compensation has not been paid, and its officers wrongfully hold possession, they may be ejected. United States v. Lee, 106 U.S. 196." *United States v. Crown-Zellerbach Corp.*, 60 F. Supp. 853.

" . . . Judgment in a condemnation case must confirm the passing of title to the United States and place the title to the compensation for the full interest taken in the landowner and thus, *if the right of perpetual renewal is not paid for, the United States would not acquire that right even if a clause were inserted in the judgment.*

"In the second place, the just compensation must be paid in the immediate condemnation proceeding. *No authority exists nor ever has existed for the payment of just compensation by installments . . .*

"*There can be no judgment for an indefinite amount or a judgment payable by installments. The principle is followed that a judgment must be certain in amount and unconditional in effect . . .*

"What has been said establishes the fact that the stipulation permitting the United States to renew this lease

from year to year in perpetuity without the consent of the land owner constitutes the taking of a valuable property interest at the present time, for which just compensation must be paid in the proceeding." (Italics added.) *U.S. v. Bauman*, (1943) 56 F. Supp. 109, at 114.

Bauman gives a scholarly analysis of condemned temporary use of estates, and questions such estates because the government puts the power within its own hands to violate the rule against perpetuities by constantly extending the particular emergency so as to continue the power to renew. This case was decided in 1943 and was certainly prophetic regarding renewals, which created estates unknown to our law, namely, estates in perpetuity[2].

[2]The National Eemrgency Proclamation Sept. 8, 1939 (54 Stat. 2643). This Emergency was continued from time to time, once (Public Law 313) from April 14, 1952 to June 1, 1952; and then for 15 days to June 15, 1952 by Public Law 368 approved May 28, 1952. Notwithstanding the termination of states of war and of the National Emergency declared Sept. 8, 1939 (Proc. 2352, 54 Stat. 2643) and that declared May 27, 1951 (Proc. 2487, 55 Stat. 1647), the Congress by the Emergency Powers Continuation Act, 66 Stat. 330 (12) continued the emergency of Sept. 8, 1939 until 6 months after the termination of another emergency proclaimed Dec. 16, 1950 (Proc. 2914, 3 C.F.R., 1950 Supp., p-71) "but in no event beyond April 1, 1953, notwithstanding any other terminal date or provision of law with respect to such statutory provision and notwithstanding any limitation, by reference to war or national emergency, of the time during or for which authorization or liabilities thereunder may be exercised or imposed."

Notwithstanding the reluctance of Congress to keep extending these acts for ridiculous periods, Congress did make what was to be the final extension with the above quoted language to indicate that that was all. The "government" was clearly warned. But once again the time was extended by deleting the date April 1, 1953 and inserting July 1, 1953 (67 Stat. 18). Three years after July 1, 1953, to-wit, July 1, 1956, the government had to get consent from the owner for renewal of the one-year terms. That is where the date comes from, which is referred to in footnote 3, the lower court opinion, (R. 149).

Since the government created these estates it should not be excusd from conforming to its own requested judgments nor should it be allowed immunity from well established rules of law.

4. The decision of the lower court is in conflict with another court of appeals on the same matter, to-wit that buildings on lands revert together with the lands to the owner as a matter of law upon the failure of the tenant to pay rentals due because of the forfeiture of the term and forfeiture of an option to renew for failure to pay rent.

U.S. v. Hayman, 115 F. 2d 599, 601, involved a lease by which radio towers remained the property of the U.S. and the government reserved the privilege of removing them at the end of the lease or within 90 days thereafter. The court said, "it is obvious that if the government should fail to remove the property before the expiration of the 90 days after the termination of the lease, the U.S. would lose the value of the property." In the instant case, the lease terminated with the option to renew for failure to pay rent; the U.S. was required under the provisions of the condemnation judgment to remove the buildings "prior to the termination of the lease." (Appendix 6)

In *Kutter v. Smith*, 69 U.S. 491, 17 L. ed. 830, this court considered an action against the fee owner to recover damages for the value of a building placed on leased premises.

Upon the tenant's failure to pay rent, the land owner retook possession, and Justice Miller said, in part:

> "The character of the building, in the present case, does not bring it within any of the principles upon which certain erections have been held removable.
>
> "The doctrine, concerning this class of fixtures which is a strong innovation upon the common law rule that all buildings become a part of the freehold as soon as they are placed upon the soil, has extended no further than the right of removal while the tenant is in possession; and has never been held to give a right of action against the landlord for their value.
>
> "The well settled rule is, that such erections as this become a part of the land as each stone and brick are added to the structure. The only exceptions to this rule are the class of fixtures already adverted to, and such rights as may grow out of express contract. The contract before us was not intended to change this rule. The agreement to purchase means nothing more than that, in a certain event, the lessor will pay the lessee the value of such building, but there is no implication of any general title or ownership in the lessee apart from that event. This contingency has not occurred, and that it can never occur is the *fault of the plaintiff* and his assignor. This observation is also applicable to the supposed hardship of taking the building, the product of the plaintiff's money and the labor, without compensation. It is from plaintiff's own default that the right to do this arises. *He had his option to pay the rent due defendant, and retain the right to payment for his building, when the time should arrive, or to give up his building, and with its loss relieve himself of the burden of paying rent. He chose the latter with the full knowl-*

edge, and there is no injustice in holding him to the consequence of his choice." (Emphasis added.)

Kutter v. Smith, supra, was quoted and followed as authority by the supreme court of the state of Washington in *Toellner v. McGinnis*, (1909), 55 Wash. 430, 435, 104 Pac. 641 (which was an action by the tenant for rents and two-thirds the value of a building) and the court said:

" . . . we are of the opinion that the default in rent and re-entry, under the terms of the lease, work a forfeiture of all right to rents subsequently earned . . . "

"It must also be admitted that the right to remove improvements or exact pay therefor, after the term, depends entirely upon the contract of the parties and was unknown to the common law — 'a strong invasion upon it' as has been aptly said. There is another fundamental principle that suggests itself . . . and that is that, whatever may be the form of the contract or manner of stating it, the building becomes, as it is erected brick by brick and stone by stone, a part of the land. So that, after all, from the very nature of things, the question is not a question of title reserved in the lessee, or the right to maintain title on the part of the lessor, but primarily a question of compensation; a right, if any, to recover the value of the building or declare a lien and enforce it as an equitable remedy. When so considered, the only question remaining is whether, under all the facts, appellants are entitled to such compensation. A similar contract was before the court in *Kutter v. Smith*, 69 U.S. 491, 17 L. ed. 830, wherein it was held that, in the absence of a covenant to remove within the term, the contract did not change the rule that the building became a part of the land and the title was in the lessor . . . "

MOTION FOR SUMMARY REVERSAL

Come now the petitioners and move this court for an order summarily reversing that portion of the judgment of the lower court remanding to determine:

> "The question of liability on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings in the record or by proceeding to another trial, as may be thought proper."

This motion is based on the following grounds:

(1) On the matters and things alleged in the petition for writ of certiorari filed herein;

(2) That the lower court has substituted conjecture for very clear findings. We set forth both the findings and the conjecture. The findings were:

I. (R. 107-108)

(a) "That it was incumbent upon the plaintiff to prove its exclusive right of possession of the land upon which the buildings have, *at all times material to this action*, been and are now located. (Emphasis added.)

II. (R. 108)

"That the plaintiff has not fully sustained its burden, in that, although the judgment on the declaration of taking and the judgment awarding just compensation were valid, the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid; therefore, the Court cannot find that such installments have been paid and accordingly the Court now finds that the plaintiff is not entitled

to the requested order that the defendants be specifically compelled to remove said building and clear the site upon which they stand. This finding is based upon the necessity of the plaintiff establishing, in this action, its exclusive right of possession of said real estate."

(b) In substitution for these findings, the lower court conjectured: That petitioners might be liable to the government for trespass, etc. but that:
"This would not be true *if* the government did not have the exclusive right of possession of the land during *any* of the time when these appellants owned the houses. Barnett, Owens and Ester argue that the trial court so held in its supplemental findings of fact.

"We are not certain that this is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the question of whether specific performance should be ordered. With regard to this, only the government's immediate right to exclusive possession at the time the matter was before the court was important. *It may be* that the government was not prompt in completing its payment for previous months or years. *But, if* such payments were ultimately made, the government's exclusive right of possession during *such period*, at least as against these appellants, would seem to be established." (Emphasis added.)

(Amended Order, Dec. 23, 1957, R. 168-169).

(3) The grounds asserted in par. 2 immediately preceding are especially true, if it is noted that the trial court once entered but later reversed findings that the gov-

ernment did have exclusive possession *at all times material to the action*, that the government had conformed to judgments of just compensation, had timely renewed under its option to renew (R. 70-71, par. XII). Thus it is clear that *all times* material to the action were considered.

(4) It is unjust to submit petitioners to the burdensome risk of appearing before the trial court; and it is a far departure from the accepted and usual course of judicial proceeding to ignore clear findings and this court should exercise its power of supervision.

CONCLUSION

For the foregoing reasons petitioners respectfully submit that this Petition for a Writ of Certiorari should be granted, and petitioners' Motion for Summary Reversal should be granted.

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Appendix 1

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT

Excerpts from original opinion of the lower court (R. 148-156)

CENTURY INVESTMENT CORPORATION and VIRGIL J. PAGUE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 15,219

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, his wife; DONALD F. OWENS and JEAN OWENS, his wife; EDWARD R. ESTER and LORRAINE M. ESTER, his wife,

vs.

UNITED STATES OF AMERICA,

Oct. 30, 1957

Appeals from the United States District Court for the Western District of Washington Northern Division

Before: Healy, Fee, and Hamley, Circuit Judges

HAMLEY, Circuit Judge:

"The government instituted this action on October 4, 1954. After a trial, findings of fact favorable to the government were entered. Based thereon, conclusions of law were entered, in which it was held that the government was entitled to a decree of specific performance enforceable against all appellants. It was also held that the

government was entitled to damages from all appellants, to be measured by the net revenues they had received from the rental of the buildings. The court determined that an accounting would be required to enable the court to fix the amount of damages to be awarded. In conformity with these conclusions, an order was entered referring the matter to a special master for an accounting and report. The master's supplemental report was later approved by the trial court.

"Thereafter, supplemental findings of fact were entered. It was found that the government had not proved that it had paid the future ascertainable installments of just compensation which it was obligated to pay to entitle it to continued exclusive possession of the tracts in in question. Because of this, the court found that the government had not fully sustained its burden of proving its continued exclusive right to possession of the land in question." (R. 151-152).

"The judgment against these three was not intended as an award of damages for breach of contract, since they were not privy to the contract. The theory of the award against them, as indicated by what has been said above, is that they were amenable to a decree of specific performance, but that, because the government had not proved its continued exclusive right to possession of the land, it would be more equitable to allow damages only, to be measured by the net rentals these appellants had received." (R. 152)

"Here, the award was not based upon expense incurred or damages sustained by the government, or upon the reasonable rental value of the land while appellants were using it for commercial purposes. Instead, the award was based upon the net rentals received by appellants from their own buildings during the time the

government had the right of possession of the land." (R. 153)

"It is nevertheless true that the complaint is broad enough to sanction damage on the theory of trespass or an implied contract to pay the reasonable rental value of the lands. It is possible that there may have been such a trespass, or the existence of circumstances from which a contract to pay the reasonable rental value of the lands may be implied." (R. 154)

Appendix 2

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT

CENTURY INVESTMENT CORPORATION and VIRGIL J. PAGUE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 15,219

Dec. 23, 1957

ARTHUR G. BARNETT, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING

Before: Healy, Fee, and Hamley, Circut Judges

It is ORDERED that the last paragraph on page seven of the opinion be stricken, and that the following paragraphs be inserted in lieu thereof:

"This would not be true if the government did not have the exclusive right of possession of the land during any of the time when these appellants owned the houses. Barnett, Owens, and Ester argue that the trial court so held in its supplemental findings of fact.

"We are not certain that is is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the

question of whether specific performance should be ordered. With regard to this, only the government's immediate right to exclusive possession at the time the matter was before the court was important. It may be that the government was not prompt in completing its payments for previous months or years. But, if such payments were ultimately made, the government's exclusive right of possession during such period, at least as against these appellants, would seem to be established.

"In our view, justice therefore requires that the judgment as to Barnett, Owens and Eter be reversed and the cause remanded to the trial court. Upon remand, the trial court may determine the question of liability on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings in the record or by proceeding to another trial, as may be thought proper. If recovery is warranted on either of these theories, it should not include any rental value of the buildings, but may otherwise include any actual expense incurred or monetary damages sustained by the government."

It is FURTHER ORDERED that the last sentence of the fourth paragraph of page nine of the opinion be amended to read as follows:

"The judgment against Pague must therefore be reversed and the cause remanded for further proceedings similar to those which have been specified as to Barnett, Owens, and Ester."

It is FURTHER ORDERED that the petition for rehearing be denied.

(Endorsed:) Order Amending Opinion, etc.

Filed Dec. 23, 1957.

Paul P. O'Brien, Clerk.

Appendix 3

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT

CENTURY INVESTMENT CORPORATION and VIRGIL J. PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, his wife; DONALD F. OWENS and JEAN OWENS, his wife; EDWARD R. ESTER and LORRAINE M. ESTER, his wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 15,219

Oct. 30, 1957

JUDGMENT

Appeals from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, and that

this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

(ENDORSED) Judgment
Filed and Entered: October 30, 1957
PAUL P. O'BRIEN, Clerk.

Appendix 4

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT

Excerpt from Proceedings of Monday, December 23, 1957

Before. MEALEY, FEE and HAMLEY, Circuit Judges

ORDER DIRECTING FILING OF ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING

ORDERED that the typewritten order amending the opinion of this Court, heretofore filed and entered on October 30, 1957, be forthwith filed by the Clerk.

FURTHER ORDERED that the petition for rehearing be, and hereby is denied.

Appendix 5

The Declaration of Taking (R. 70, fdg. XII, Plaintiff's Exh. A-34), filed June 15, 1945 provided that

> "the estate taken for said public use is the exclusive use of the land . . . for a period of one year with the right to renew from year to year for the duration of the National Emergency and three years thereafter . . . "

and the deposit made was

> "estimated by me to be just gross annual compensation for the exclusive use of said lands, together with the rights herein set forth— . . . "

The Judgment on Declaration of Taking (Plaintiff's A-35) was entered on June 16, 1945 and provided that

> "there is vested in the United States of America the exclusive use of the . . . land . . . for a period of one year, with the right to renew from year to year . . . ",

and recited that a deposit had been made for the estate taken for public use. Subsequent judgments were thereafter entered. (R. 71, Fdg. XII); those pertaining to the properties herein involved being filed as Defendants' Exhibit A-30 to 39 inclusive.

Appendix 6

While each judgment varied in detail, all contained identical language regarding just compensation and the amount of rental to be paid for the term. The following is quoted from the judgment of February 14, 1946 (which affected Parcel 3 and is Def's Ex. A-31) and, as stated, each of the judgments also contained this language:

> "1. That the sum of $27.50 is the just compensation and the total amount of damages to be awarded and paid for the taking by the United States of America for the exclusive use of said property . . . for one year beginning February 21, 1945, the date the United States acquired possession . . .
>
> "3. That the United States may exercise its right to renew the estate taken in said land from year to year as provided in the declaration of taking . . .
>
> "6. Title to all such alterations, structures, fixtures and improvements shall be and remain in the United States, except as hereinafter provided;
>
> "7. Prior to the termination of the lease, the Federal Public Housing Authority shall remove all buildings erected or constructed by it upon the demised premises; . . . "

Appendix 7

Defendants' Exhibit A-35 is the Judgment Fixing Just Compensation and Directing Payment of Rent for Term Beginning February 21, 1951, on Parcel #5 owned by petitioners. Judgment was entered July 23, 1951 and was based on a stipulation entered into between the government and predecessors in title and was dated Nov. 13, 1950. The stipulation is part of the same Exhibit A-35.

The stipulation provided:

> "NOW, THEREFORE, it is stipulated and agreed by and between the United States of America and the undersigned owner(s) of the above-mentioned parcel(s) that the just compensation and increased future payments payable annually by the United States of America for the use of said parcel(s) for the annual term beginning February 21, 1951 and for each and every extension or renewal thereof shall be in the following amounts:
>
> "Parcel No. 5 $21.00
>
> together with an amount equal to general real estate taxes lawfully levied and assessed against the said parcel(s), without interest or penalties thereon, for the current and each subsequent year the said parcel(s) is (are) used by the United States of America, and
>
> "IT IS FURTHER STIPULATED AND AGREED that in the event the United States shall terminate its use of the said parcel(s) or any of them during any annual term by the filing in this proceeding of a notice of termination, payment of the above-mentioned amount(s), including the amount(s) equal to general real estate taxes, shall be prorated for such proportion-

ate part(s) of the final annual term and the tax year as the United States shall use the said parcel(s)."

Excerpts from the judgment are as follows:

" . . . and it further appearing to the Court that the owners of said property have stipulated with petitioner, United States of America, that the sum of Twenty-one Dollars ($21.00), together with an amount equal to general real estate taxes lawfully levied and assessed against said parcel without interest or penalties thereon, for the current and each subsequent year of the Government's occupancy, is the just compensation for the year beginning February 21, 1951 and subsequent years of the Government occupancy, and it further appearing to the Court that the sum of Twenty-one Dollars ($21.00) is on deposit on account of the annual rent for Parcel 5 for the year beginning February 21, 1951, and the Court being fully advised in the premises,

"NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the just compensation to be paid for the estate condemned in Parcel 5 for the year beginning February 21, 1951, and all subsequent years of the Government's occupancy is the sum of Twenty-one Dollars ($21.00), plus an amount equal to annual general real estate taxes as provided in said stipulation on file herein, and

"IT IS FURTHER ORDERED that the respondents, Rose S. Larson, a widow, and Charles W. Endres are entitled to award of just compensation for the year beginning February 21, 1951, and the Clerk of this Court is hereby directed to pay to Rose S. Larson and Charles W. Endres the sum of Twenty-one Dollars ($21.00) in full satisfaction of the annual rent for the year beginning February 21, 1951, and

"IT IS FURTHER ORDERED that said judgment entered September 28, 1945, is in full force and effect as to all other provisions, except the amount of annual rent as herein provided."

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JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

EDWARD R. ESTES and LORRAINE M. ESTES, His Wife; DONALD F. OWENS and JEAN OWENS, His Wife; and ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His Wife, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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THE ARGUS PRESS, SEATTLE

No. 873

Supreme Court of the United States

OCTOBER TERM, 1957

EDWARD R. ESTER and LORRAINE M. ESTER, His Wife; DONALD F. OWENS and JEAN OWENS, His Wife; and ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His Wife, *Petitioners,*

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VS.	
UNITED STATES OF AMERICA, *Respondent.*	

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION[1]

QUESTION AS PRESENTED BY BRIEF IN OPPOSITION (Br. 2)

The absence of a statement that the government failed in its burden of proof to prove its right to the exclusive possession of the lands owned by petitioners underlying the buildings involved is fatal in its presentation of the question. Actually, the trial court held that the government had failed to prove, as alleged in its complaint (Par. VIII, R. 8), that it had the exclusive right of possession of the land (Suppl. Fdgs. I and II, R. 107-108). The question is not therefore whether the

[1] Br. references are to the brief in opposition. Pet. references are to the petition for a writ of certiorari. In reply to footnote 1 (Br. 1) petitioners set forth applicable portions of the decision (Pet. 33-35) of the court of appeals in the belief, still held, that Rule 23(1)(j) applied. The amended opinion was appended in full (Pet. 36-37). The government's printing in full is appreciated.

government had lost all interest in the underlying realty but, rather, what interest does it have as a matter of law when it fails to prove its alleged right of exclusive possession. The trial court expressly found that the government failed to prove (R. 108) that it had paid the just compensation decreed in the amended orders of condemnation in a cause introduced in evidence by the government to prove its right to possession. Since the findings constitute the facts it is strange that the government in its presentation of the question refers to "alleged" nonpayment of just compensation. All the consequences in law following the government's failure to prove its alleged right to exclusive possession of the land are set forth in the petitioner's presentation of the questions (Pet. 3-5).

It follows that such failure by the government does constitute a complete defense to the government's action.

ARGUMENT

1. The government introduces new matter *de hors* the record (Br. 8) which is of great significance. This reply is made necessary to point out sharp practice and petitioners frankly do not know how to do it.

The government states (Br. 8) that it had paid just compensation, and in footnote 7 states that all annual rentals had been paid, that taxes (a part of the rent decreed as just compensation—Pet. 43-44) had not been paid because of a refusal by the successors in interest (an obvious reference to petitioners) to follow the established practice of submitting their tax bills. Nowhere in the record in the trial court, nor in the find-

ings, nor in the record before the court of appeals or this court is there evidence of such a refusal by petitioners.

Further, the last sentence in said footnote asserts: "These facts are established in the condemnation proceedings of which the district court took judicial notice." The court took judicial notice of the proceedings which were in a separate cause but could not judicially note facts not to be found therein. The court gave the government several weeks' continuance to produce proof of payment of just compensation. At the hearing the government failed to furnish the requested proof. Instead it filed an affidavit and a ten-page brief regarding taxes and practices (Documents numbered, respectively, 121 and 122 in the files before the trial court) (R. 135). The trial court thereupon reversed its first findings that the government had the exclusive right of possession and entered supplemental findings that

> "it was incumbent upon the plaintiff herein to prove its exclusive right of possession of the land upon which the buildings . . . involved herein have, at all times material to this action, been and are now located" (Fdg. I, R. 107-108)

and, that the plaintiff had not sustained that burden in that

> " . . . the plaintiff has not proved that . . . installments of . . . just compensation have been paid; therefore, the Court cannot find that such installments have been paid. . . . This finding is based upon the necessity of the plaintiff establishing, in this action, its exclusive right of possession of said real estate."(Fdg. II, R. 108)

This court has its choice of accepting the trial court

findings or the bald assertion of the government that the court took judicial notice of the very facts which the government did not prove.

The reason for this petition is to clarify the uncertainty raised by the court of appeals as to the meaning of the findings concerning exclusive possession (Pet. 36). Clearly, the record shows that the trial court did most thoroughly consider the government's claim and rejected it. The trial court first granted removal of the houses (Concl. X, R. 77-80), and concluded that the government should have an injunction restraining interference with the government's enjoyment of the land (Concl. XI, R. 80), and that the government should have damages for the wrongful use of the land "underlying said buildings . . . from the time of said breaches of contract to and including the present time; . . . " (Concl. XII, R. 80-81). Later, and as related above, the trial court reversed its findings after the government failed to sustain the burden of proof in proving its right to exclusive possession of the land by failing to produce proof of payment of just compensation. That the trial court gave this issue the full gamut of consideration appears from the first findings. In view of this the uncertainty of the court of appeals is not understandable. It is unjust to force petitioners as land owners to meet again the issue of proof of right to exclusive possession in another attempt by the government to obtain damages for alleged wrongful use of the land.

2. Item 2 of the government argument (Br. 7) is that the government still had the right of possession because the trial court stated that in approximately two months

the defendants (petitioners) "would have the right of exclusive possession of said lands and the right to move said buildings back on said lands; . . . " (Supp. Fdg. III, R. 108-109). But the trial court finding had already decided that the government had not proved its right to exclusive possession. So far as the issue is and was settled the government had nothing. Any language about what sort of rights the petitioners or any other person might have in the future does not set aside the government's failure of proof and give the government possession. If the government felt it still had some right of possession it should not have withdrawn its appeal when the first sweeping findings in its favor were reversed[2] (R. 142-143).

---

[2] As the court of appeals holds, the petitioners are not privy to the contract to remove (Br. 15) and so they were not amenable to specific performance. If the government had proven its right to the exclusive possession of petitioners' lands the government could have removed the buildings (R. 16, item 6) or the parties to the contract could have been made to perform. If it did not have exclusive possession for that purpose can it be conjectured that it might have had the right of possession during part of the time? The court of appeals recognized this fatal defect in proof but felt in its amended opinion (Pet. 36) that this could be corrected by subsequent payments of just compensation. The government was given every opportunity (*supra*, p. 3) to prove subsequent payments for the times material to the action on trial, including several weeks' continuance in the spring of 1956 and failed.

As is indicated from the findings a government agent (Fdg. V, R. 65) assisted in making the only assignment in the record. The brief in opposition quotes the contract provision prohibiting assignment of the contract or interest therein (Br. 3, Ftn. 3). Like footnote 7 petitioners believe this is inserted to mislead this court because there is no evidence in the record, nor is there any finding that the petitioners now before this court took an assignment. Buying two buildings as second and third party purchasers (Fdg. XI, c., d., R. 69-70) does not constitute an assignment. The City of Seattle allowed petitioners to use the streets and alleys upon which part of the buildings were situate, the buildings were altered to comply with the city codes (Fdg. XV, R. 72-73). Despite all of this and the expense involved the court originally concluded as a matter of law that since the government had the right of ex-

3. In its statement (Br. 6), the government states that the trial court concluded that the government was entitled "to the specific and other relief sought." To clarify the uncertainty raised by the court of appeals (Pet. 36-37; Br. 7) as to whether the meaning of the finding concerning exclusive possession was made only in connection with specific performance we italicize *and other relief sought*. The conclusion was that the government was entitled to damages for *wrongful use of the underlying land* from the dates of the breaches of the contract "to the present time" (Conc. XII, R. 80-81), and that it was entitled to a decree enjoining against any interference with enjoyment of "said exclusive use" (Conc. XI, R. 80).

The court abrogated these first findings and entered supplemental findings (R. 107-108) that the government had failed to prove its right to exclusive possession of the lands. Because of the elimination of damages for alleged wrongful use of the lands by petitioners the government now contends, resting on the uncertainty of the court of appeals, that "The case has been remanded simply to give the United States an opportunity to prove its claims within the scope of the pleadings . . . " (Br. 7). It not only had the opportunity—it first prevailed on the very issue that the court of appeals is uncertain about, namely, the possibility "that there may have been a trespass, or the existence of circumstances from which a contract to pay the reasonable rental value

---

clusive possession of the land the petitioners should be ordered to move the buildings and clear the sites to a depth of several feet which meant lifting sewers and plumbing newly installed (Concl. X, 77 80), and it was immaterial that the petitioners could move the buildings back on the lands which they owned upon termination of the government's term.

of the lands may be implied" (Br. 17). But the court of appeals also stated (Br. 17):

> "This would not be true if the government did not have the exclusive right of possession of the land during any of the time when these appellants owned the houses. . . .
>
> "We are not certain that this is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the question whether specific performance should be ordered. With regard to this, only the government's immediate right to exclusive possession at the time the matter was before the court was important. . . ."

But the court of appeals overlooks that the times involved were from the dates of the breach of contract in Nov., 1953 (Fdg. IX, R. 67-68; item 3, R. 9), to the present time which was the date of the trial in September, 1955 (R. 62).

The trial court did consider the government's right of possession at all times material to the action which included from 1945 (Fdg. XII, R. 70-71) through Nov. 2 or Nov. 12, 1953, the times pleaded as breaches of contract (item 3, R. 9 and Fdg. IX, R. 67) and through the unauthorized extension[3] date January 15, 1954 (Fdg. IX, R. 67-68). The court would not have eliminated the other relief if the government had proved its right to

---

[3] Footnote 6 (Br. 5) refers to an unauthorized extension of the time for the performance of said contract by the agent Michaelson. Again since petitioners are not parties thereto and the court of appeals in its decision states that petitioners are not privy to the contract (Br. 15) we cannot understand why the government here seeks to involve this court in said matter other than to keep confusing and commingling the cause of action on the contract with the cause of action based on exclusive use.

exclusive possession "during any of the time when these appellants owned the houses" (Amended opinion, Pet. 36). Petitioners acquired the Barnett and Owens houses on Jan. 20, 1954, and Ester house in Nov., 1953 (Fdg. XI, R. 69-70 item c. as to Barnett and Owens; item d. as to Ester. The date of 1954 in d. has been corrected to 1953—and indicated in the decision of the court of appeals at Br. 12). The retrial of the issue of wrongful use of the land will again require proof by the government of its right of exclusive use thereof paramount to that of the petitioners as the owners. This in turn requires again that the government prove its compliance with the decrees of just compensation in the separate condemnation proceeding upon which it rests its claim. This is the same proof already litigated. Contrary to the government's argument (Br. 8) petitioners did not contend nor did the trial court find that the original condemnation proceedings were void.[4] It is submitted that

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[4] The first case (Br. 8) cited by the government deals with an appeal from an inadequate award in a condemnation of land. The court would not make an allowance for the value of improvements erected thereon by the government during the term of a negotiated lease, and which the government had the right to remove before termination. The government condemned to continue a lawful purpose and made a deposit of estimated just compensation. It is not in point. In the present cause the government sold all the buildings and had in fact had its use of streets and alleys upon which the buildings were partly situate cancelled by the City of Seattle on Oct. 28, 1953 (Fdg. XV, R. 72-73). Furthermore, in the present cause the Government did not condemn the fee before expiration of its temporary annual term. The second cited case (R. 8) held that the issue of damages for removal and other costs was *res judicata* in a suit by a tenant against the owner of a building which had been condemned in a separate action in which the tenant was awarded just compensation. The case is no support for the government, and might be said to be authority for the petitioners in that the issue of damages to the government for wrongful use of the land underlying the buildings at all times material to the action was most thoroughly considered by the trial court.

the issues which the government wants to try again have been tried once and have been decided, as shown by the reversed findings.[5]

CONCLUSION

It follows that the petition for certiorari and the motion for summary reversal should be granted. This court should exercise its supervisory function so as to keep the review by the court of appeals within the findings. The practical effects of the judgment of the court of appeals is to create confusion for other litigants involved in a review based on the findings.

Respectfully submitted,

VERNON W. TOWNE
ARTHUR G. BARNETT, ESQ.
ALEC DUFF
Attorneys for Petitioners.

April, 1958.

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[5] The parties to the contract have not petitioned for certiorari and the remand of the court of appeals directs a new trial on the issue of damages for breach of contract. But the government is not satisfied and wants another opportunity to prove its right of exclusive possession as against petitioners who are not parties to, nor assignees of, the contract, in an effort to collect damages for the alleged wrongful use of petitioners' own land by petitioners, on the theory of trespass or for reasonable rent.

The court of appeals remanded for a new trial against Century Investment Company, a party to the contract for removal, on the issue of damages for breach of contract, and also against Virgil J. Pague, its president at the time; these parties are not petitioners here.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 873

EDWARD R. ESTER AND LORRAINE M. ESTER, HIS WIFE; DONALD F. OWENS AND JEAN OWENS, HIS WIFE; AND ARTHUR G. BARNETT AND VIRGINIA N. BARNETT, HIS WIFE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals, as amended on denial of rehearing, is reported at 250 F. 2d 139. Excerpts from the opinion and all of the amendment are set out in the appendix to the petition (Pet. App. 33–37).[1]

[1] Petitioner has failed to comply with Rule 23 (1) (i) of this Court, which requires that a copy of the opinion of the Court of Appeals be appended to the petition. For the Court's convenience we have set forth the full opinion, as amended on denial of rehearing, as an appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered October 30, 1957 (Pet. App. 38–39). A timely petition for rehearing was denied on December 23, 1957 (Pet. App. 36–37). The petition for a writ of certiorari was filed March 22, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The United States brought suit seeking damages and specific performance of a contract to remove temporary war housing resting on land it held under condemnation of temporary use. The decision of the district court denied specific performance but awarded damages. The court of appeals reversed and remanded for clarification of findings or for retrial. The question presented by this petition, petitioners having subsequently acquired fee title to the underlying land, is whether the claim that the United States had lost all interest in the underlying realty because of alleged nonpayment of just compensation constitutes a complete defense to the Government's action.

STATEMENT

The facts of this case, so far as pertinent here, may be summarized as follows:

In October 1954, the United States filed a complaint seeking redress for the violation of its rights growing out of the failure of petitioners and others to remove temporary war housing from lands the use of which had been acquired by the United States for such housing.

By condemnation proceedings instituted during World War II, the United States acquired exclusive temporary use of certain land in Seattle for a temporary housing project; the project being constructed under the authority of the Lanham Act, 54 Stat. 1125, 42 U. S. C. 1521, *et seq.* The Government's term for the use of the land was extended through June 30, 1956. By amendments to the Lanham Act, Congress directed that "the Administrator shall, as promptly as may be practicable and in the public interest, remove (by demolition or otherwise) all housing under his jurisdiction which is of a temporary character * * *." 64 Stat. 48, 64, 72–73. In order to comply with this congressional mandate, the Administrator of the Public Housing Administration, through the Housing Authority of the City of Seattle, issued public invitations for bids for the sale and removal of 10 temporary war housing buildings, containing 144 dwelling units, and for the clearance of the real estate site.

A contract of sale of these buildings to Century Investment Corporation was executed.[2] After August 21, 1953, Century purported to convey four of the buildings in the project without imposing the condition or obligation that they be removed from the site.[3] These buildings remain on the site and are

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[2] While the Century Investment Corporation and Virgil Pague, president and one of its incorporators, were defendants and appellants with the petitioners in the courts below, neither Pague nor Century has petitioned for certiorari.

[3] Paragraph 8 of the general conditions of the contract here involved provides (R. 17): "8. *Assignment.*—Neither this con-

being used for private commercial dwelling purposes (Fdg. X, R. 68).[4] Building 104 was purportedly acquired by petitioners Arthur G. Barnett and wife and Donald F. Owens and wife on January 20, 1954, directly or indirectly from Century. On January 20, 1954, petitioners Barnett, Owens and their wives jointly acquired an interest in the lots underlying building 104. Building 105 was purportedly acquired by petitioners Edward R. Ester and wife in November 1953 from Carl W. Pague, who had acquired the same from Century (R. 27). Thereafter, petitioner Ester acquired an interest in the lots underlying building 105 (Fdg. XI, R. 68–70).

None of the petitioners possessed an interest in the lands, temporary use of which had been condemned, at the commencement of those proceedings. They acquired their respective interests after the date of the contract with Century for the sale and removal of the buildings. By the declaration of taking filed in the condemnation proceedings on June 15, 1945, the judgment entered therein on June 16, 1945, and by subsequent judgments fixing compensation entered in that action, the United States was granted the right to renew its exclusive use from year to year without the consent of the owners of the land, not to exceed three years after the termination of the national emergency declared to exist by presidential proclamation of Sep-

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tract nor any interest therein shall be assigned or transferred by the Purchaser to any other party. (Section 3737, Revised Statutes, as amended, 41 U. S. C. 15.)"

[4] "R." references are to the printed record as filed in the court of appeals.

tember 8, 1939 (54 Stat. 2643). The Government filed timely notice, yearly, of its intention to renew its exclusive use, extending to February 21, 1956.[5]

Near the expiration date for removal of the buildings and clearance of the sites, Century asked the Seattle Housing Authority for an extension of 60 days in which to remove the buildings. The Acting Director of the Seattle Housing Authority purported to extend the time to January 15, 1954.[6] The district court found that petitioners had "full and complete knowledge" of the removal contract, and were "not innocent purchasers of same [the buildings] without knowledge and notice of the contract['s] expressed requirement that said buildings be removed from the site upon which they were situated * * *" (Fdgs. XIII, XIV, R. 71–72; Conc. X, 77–79). The court of appeals similarly refers to the "full and complete knowledge" of the petitioners (App., *infra*, p. 12).

The buildings not having been removed, the present action was instituted and relief both of a specific nature and in the form of damages was sought against the petitioners, Century, and other defendants. Af-

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[5] The Government further extended its exclusive use for another yearly period to February 21, 1957, but subsequently terminated its use as of June 30, 1956 (App., *infra*, p. 11, fn. 8; cf. Pet. 10).

[6] While the Seattle Housing Authority purported to extend the time for performance, the district court concluded that "there never was any general agency from the plaintiff [United States] to said organization [Housing Authority of the City of Seattle] or to Mr. Michaelson with power broad enough to generally authorize said organization or Mr. Michaelson to waive any of the terms and conditions of said contract" (Conc. V, R. 75).

ter a trial, an oral decision was given by the district court in favor of the United States, concluding that it was entitled to the specific and other relief sought. On October 20, 1955, findings of fact and conclusions of law were entered. The district court referred the case to a special master to determine the amount of damages. After the master's report was received, the court abrogated its earlier position and declined to order specific performance of the contract of removal and site clearance. The reasons stated for this action were (1) that the estate claimed by the United States would expire July 1, 1956, which would be only a little more than two months from the date of decision; (2) that the United States had no present intention of extending the time; and (3) that the defendants "would have the right of exclusive possession of said lands and the right to move said buildings back on said lands * * *" (Suppl. Fdg. III, R. 108–109). Rather than ordering such removal for a short period, the court determined to award damages.

The court of appeals reversed the judgment as to petitioners on the ground that the theory upon which the district court awarded damages was invalid. It agreed, however, with the United States that certain other theories were within the scope of the pleadings and might sustain an award of damages. The district court was authorized to determine this possible liability "either by construing the findings in the record or by proceeding to another trial, as may be thought proper" (App., *infra*, p. 18).

ARGUMENT

1. A reading of the opinion of the court of appeals (App., *infra*, pp. 9–20) shows that no question has been decided which justifies review by this Court. Petitioners succeeded in reversing the district court's judgment against them. The case has been remanded simply to give the United States an opportunity to prove its claim on theories within the scope of the pleadings other than the one the district court adopted. To deny the United States that opportunity at this time, as petitioners seek in asking summary reversal (Pet. 1, 30–32), would be unjust. Petitioners will have ample opportunity to seek review of any unfavorable judgment obtained in the future.

2. The petitioners' contention (Pet. 11, 13, 14, 19) that the Government cannot prove its case on a theory of trespass or implied contract to pay reasonable rental because the findings of the district court are clear, plain, and positive to the effect that the United States had lost all right to possession of the land because of failure to pay just compensation, and thereby title to its buildings had vested in the petitioners, is fully answered by the district court's finding, quoted above (*supra*, p. 6), that it would be approximately two months after its decision before the defendants (petitioners) "would have the right of exclusive possession of said lands". As the court of appeals expressly recognized (App., *infra*, p. 17), there is some uncertainty as to the meaning of the finding concerning exclusive possession, which had

been made in connection with the question whether specific performance should be ordered. In view of this, the finding certainly does not clearly have the meaning which the petitioners would give to it. Furthermore, the United States had, in fact, paid just compensation in the condemnation case[1] and, even if it had not, this would not be a ground for saying the condemnation proceedings were void, that the United States was a trespasser, or that title to its buildings had vested in the petitioners. Cf. *Bibb County, Georgia* v. *United States*, 249 F. 2d 228 (C. A. 5); *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375 (C. A. 7).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari and the motion for summary reversal should be denied.

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys.

APRIL 1958.

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[1] Rentals owing had been paid for all years. Taxes had not been paid for some recent years because of a refusal by the successors in interest to follow the established practice of submitting their tax bills to the administrative authorities who would then pay them. These facts are established in the condemnation proceeding of which the district court took judicial notice (Fdg. II, R. 63–64).

APPENDIX

United States Circuit Court of Appeals for the Ninth District

No. 15219

CENTURY INVESTMENT CORPORATION AND VIRGIL J. PAGUE, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

ARTHUR G. BARNETT AND VIRGINIA N. BARNETT, HIS WIFE; DONALD F. OWENS AND JEAN OWENS, HIS WIFE; EDWARD R. ESTER AND LORRAINE M. ESTER, HIS WIFE, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court for the Western District of Washington, Northern Division

Before: HEALY, FEE, and HAMLEY, *Circuit Judges.*

HAMLEY, *Circuit Judge:* This action involves the asserted breach of a contract to remove buildings from four tracts of land in Seattle, Washington. The suit was brought by the United States to obtain specific performance of the contract and damages for the delay in removing the buildings. Two corporations and twelve individuals were named defendants.

After a trial to the court without a jury, a judgment for damages in varying amounts was entered against the following defendants: Century Invest-

ment Corporation, Virgil J. Pague, Mr. and Mrs. Arthur G. Barnett, Mr. and Mrs. Donald F. Owens, and Mr. and Mrs. Edward R. Ester.[1]

Barnett, Owens, and Ester, joining in one appeal, contend that, as to them, the judgment cannot be sustained on the theory of breach of contract, as they were not privy to the contract. They further argue that, for various reasons, the judgment cannot be sustained on the theory adopted by the trial court, namely, that damages may be awarded as an equitable substitute for specific performance. Century and Pague, joining in another appeal, contend that the judgment must be reversed as to them because the contracting officer has not determined the amount of damages, and there is assertedly no proof of actual damages.

The facts which must be considered in passing upon these and other questions are established by the unchallenged findings and supplemental findings of fact.

The buildings in question were erected in 1945 as temporary wartime housing by the Public Housing Administration, an agency of the federal government. The land so utilized had been previously acquired by the United States under the condemnation provisions of the Lanham Act, as amended, 54 Stat. 1125, 42 U. S. C. A. § 1521 et seq. Under the terms of the judgments fixing compensation in the condemnation actions, the United States was given the option to renew its exclusive use from year to year, not to exceed three years after the termination of the

[1] The male members of these respective marital communities will be hereinafter referred to as if they were the only personal appellants. The action was dismissed as to Mrs. Virgil J. Pague and several other defendants not named above.

national emergency.[2] The government filed timely notice, yearly, of its intention to renew its exclusive use, extending to February 21, 1957.[3]

Prior to June 22, 1953, the administrator of the Public Housing Administration called for bids for the sale and removal of these and other temporary buildings. This action was taken pursuant to § 313 of the Lanham Act, as amended on August 18, 1952, by Ex. Ord. No. 10385, 42 U. S. C. A. § 1553. This section provides for the removal, by demolition or otherwise, not later than July 1, 1954 (except under certain specified conditions), of all temporary housing constructed under the provisions of subchapter IV of the Lanham Act.

The high bid for the purchase and removal of buildings Nos. 102, 103, 104, and 105 was submitted on behalf of Pague. The bid was accepted, but the balance of the purchase price was tendered on behalf of Century, then in the preliminary stages of incorporation. Pague was one of the incorporators. Century, but not Pague, was named in the contract, which was executed on July 14, 1953. Under this contract, Century purchased the buildings and agreed to remove them from the tracts on which they were situated, and to clear the sites by November 12, 1953. The Seattle Housing Authority, which represented the Public Housing Administration in connection with some details of this contract, later purported to extend this termination date to January 15, 1954. Century posted a five-thousand-dollar performance bond.

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[2] This was the national emergency which was declared to exist by the presidential proclamation of September 8, 1939 (54 Stat. 2743).

[3] The government subsequently terminated its use as of June 30, 1956.

On August 21 and October 5, 1953, Century sold buildings 102 and 103, respectively, to Pague, for $1,932 each, without imposing the condition or obligation that they be removed from the site. Pague later acquired an interest in the land underlying these buildings.

Century sold building 104 to R. M. Scougal, F. T. Crow, Pague, and the latter's brother, Carl W. Pague, without imposing the condition or obligation that it be removed from the site. On January 20, 1954, Barnett and Owens purchased this building from these persons, for $6,413.09. At the same time, Barnett and Owens acquired an interest in the land under building 104.

In November 1953, Ester acquired building 105 from Carl W. Pague for $3,590. Carl W. Pague had previously acquired this building from Century for $1,932. Ester later acquired an interest in the land underlying this building. In selling this building, neither Century nor Carl W. Pague imposed the condition or obligation that it be removed from the site.

The purchase of building 104 by Barnett and Owens was a partnership venture, the details of which were handled by Barnett. Prior to making this purchase, Barnett had full and complete knowledge of the contract obligation of Century to remove the building from its then site. The preliminary title report which Barnett and Owens secured also indicated that the land on which building 104 was located was then held for the exclusive use of the government. Ester and Virgil J. Pague had similar information concerning buildings 102, 103, and 105, and the land on which they were situated, prior to their respective purchases.

Each of the above-named appellants who now assert ownership of these buildings, endeavored, prior to his acquisition, to secure an express waiver of Century's contract obligation. Such a waiver was never obtained. After acquiring his building, however, each such appellant secured a resolution of the city of Seattle permitting the building to remain on site for a period of five years.

By action of the Seattle Board of Public Works, the government's use of the street area underlying these buildings terminated on October 28, 1953. Through the same city agency, the appellants who now claim these buildings were, on December 9, 1953, granted such street use. Each of the buildings in question has been altered so as to comply with the requirements of the Seattle building code.

The government instituted this action on October 4, 1954. After a trial, findings of fact favorable to the government were entered. Based thereon, conclusions of law were entered, in which it was held that the government was entitled to a decree of specific performance enforceable against all appellants. It was also held that the government was entitled to damages from all appellants, to be measured by the net revenues they had received from the rental of the buildings. The court determined that an accounting would be required to enable the court to fix the amount of damages to be awarded. In conformity with these conclusions, an order was entered referring the matter to a special master for an accounting and report. The master's supplemental report was later approved by the trial court.

Thereafter, supplemental findings of fact were entered. It was found that the government had not proved that it had paid the future ascertainable installments of just compensation which it was obli-

gated to pay to entitle it to continued exclusive possession of the tracts in question. Because of this, the court found that the government had not fully sustained its burden of proving its continued exclusive right to possession of the land in question.

The court further found that the present and only estate in the land now claimed by the government would expire on July 1, 1956, and that the government had no intention of renewing or extending its estate. Appellants who now claim the buildings would then, the court found, have exclusive possession of the land. In view of these circumstances, the court found that the government was not entitled to specific performance. It was further found that it would be more just and equitable to limit the government's relief to monetary damages based on "fair, reasonable, and just compensation * * * for their [defendants] failure to remove and clear the sites of and for their wrongful commercial use of, said buildings. * * *"

Based on the supplemental report of the special master, it was found that the amount to which the government was entitled by way of damages, under this theory, was $5,937.13 from Virgil J. Pague and Century, jointly and severally; $3,709.31 from Barnett and Owens, jointly and severally; and $2,432.59 from Ester. These sums represented the net revenue received by the respective appellants from rental of the buildings, as determined by the special master. It was found that the special master was entitled to a reasonable fee and expenses in the sum of $2,583, three fourths of which should be paid by appellants, jointly and severally. Conclusions of law and a judgment consistent with the findings and supplemental findings were entered on April 26, 1956.

We turn first to the questions presented by the appeal of Barnett, Owens, and Ester.

The judgment against these three was not intended as an award of damages for breach of contract, since they were not privy to the contract. The theory of the award against them, as indicated by what has been said above, is that they were amenable to a decree of specific performance, but that, because the government had not proved its continued exclusive right to possession of the land, it would be more equitable to allow damages only, to be measured by the net rentals these appellants had received.

There are at least two reasons why the judgment against Barnett, Owens, and Ester cannot be sustained on this theory. One of these is that, since they were not privy to the contract, they were no more amenable to specific performance (and hence to an equitable substitute for specific performance) than they were to damages for breach of contract.[4]

The other reason why the judgment against Barnett, Owens, and Ester cannot be sustained on this theory has to do with the measure of damages which was applied. A monetary award may be made in an action brought for specific performance, either by granting an alternative prayer for damages for breach of contract (*Gulbenkian* v. *Gulbenkian* (2 Cir.), 147 F. (2d) 173), or to provide necessary supplemental relief in addition to a decree of specific performance (*Daniels* v. *Brown Shoe Co.* (1 Cir.), 77 F. (2d) 899).

The award here made against these three appellants was not, and as we have seen could not have been,

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[4] An exception to this rule is sometimes applied in the case of contracts to purchase land. See *Ebensberger* v. *Sinclair Refining Co.* (5 Cir.), 165 F. (2d) 803.

based on breach of contract. Nor was the award intended as supplemental relief in addition to a decree of specific performance, since no such decree was entered.

It may be that the power to grant supplemental monetary relief in such actions includes the power to grant substituted monetary relief. But if so, and despite the broad discretionary powers lodged in a court of equity,[*] the measure of the award must still accord with some recognized standard. Here, the award was not based upon expense incurred or damages sustained by the government, or upon the reasonable rental value of the land while appellants were using it for commercial purposes. Instead, the award was based upon the net rentals received by appellants from their own buildings during the time the government had the right of possession of the land. An award on this basis, entirely disassociated from the principle of compensatory damages, is not sustainable on the theory adopted by the trial court.

The government urges, however, that in any event the award can be sustained on the theory of constructive trust. *Angle* v. *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.*, 151 U. S. 1, is cited as authority for this proposition. In that case, the defendant was declared a trustee ex maleficio in respect to certain property, upon a showing that the property had been acquired through fraudulent inducement to breach a contract.

There is, in our case, no proof or finding that the conduct of Barnett, Owens, or Ester was fraudulent in any respect. Nor is it shown or found that they did anything to induce Century to breach its con-

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[*] See *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240.

tract. The most that is shown is that Barnett, Owens, and Ester knew of the contract, and of its breach, at the time they acquired their interests in the lands and buildings. Such a showing provides no basis for the imposition of a constructive trust.

Other theories advanced by the government include trespass, unjust enrichment, and quasi contract.

The awards against Barnett, Owens, and Ester were not made of any of these theories. Nor did the amounts awarded conform to the measure of damages appropriate under any of these theories.

It is nevertheless true that the complaint is broad enough to sanction damages on the theory of trespass or an implied contract to pay the reasonable rental value of the lands. It is possible that there may have been such a tresspass, or the existence of circumstances from which a contract to pay the reasonable rental value of the lands may be implied.

This would not be true if the government did not have the exclusive right of possession of the land during any of the time when these appellants owned the houses. Barnett, Owens, and Ester argue that the trial court so held in its supplemental findings of fact.

We are not certain that this is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the question of whether specific performance should be ordered. With regard to this, only the government's immediate right to exclusive possession at the time the matter was before the court was important. It may be that the government was not prompt in completing its payments for previous months or years. But, if such payments were ultimately made, the government's exclusive right of pos-

session during such period, at least as against these appellants, would seem to be established.

In our view, justice therefore requires that the judgment as to Barnett, Owens, and Ester be reversed and the cause remanded to the trial court. Upon remand, the trial court may determine the question of liability on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings in the record or by proceeding to another trial, as may be thought proper. If recovery is warranted on either of these theories, it should not include any rental value of the buildings, but may otherwise include any actual expense incurred or monetary damages sustained by the government.

This brings us to the questions presented by the appeal of Century and Pague.

For some of the reasons already stated, the judgment, in its present form, is not sustainable as to them. If damages may be awarded as an equitable substitute for specific performance, they must be measured on a different basis than that employed by the trial court.

But Century was a contracting party, and, under the findings clearly breached its contract to remove the buildings from the sites.*

Century argues, however, that, because of certain terms of the contract, the government is, at most, entitled only to reimbursement for expenses incurred by reason of Century's breach. The company also argues that damages may not be awarded by a

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*The government states in its brief, for the evident purpose of sustaining the judgment in its present form, that this is not a legal action for breach of contract, but is a proceeding seeking equitable relief. Examination of the complaint, however, indicates that both kinds of relief were sought.

court because there has been no determination of damages by the contracting officer, as provided in the contract.[1]

Both of these contentions were considered and rejected in *Aerial Lumber Co.* v. *United States* (9 Cir.), 239 F. (2d) 906.

We hold that, as to Century, the judgment should be reversed and the cause remanded for a trial on the issue of damages only, arising by reason of its breach of contract. The measure of such damages would appear to be the same as indicated above with respect to Barnett, Owens, and Ester.

Pague's appeal presents additional questions. Under the judgment, damages in the sum of $5,937.13 were awarded against him and Century, jointly and severally. It was therefore apparently the view of the trial court that Pague was liable for the same reason that Century was liable, viz., because he had contracted to remove the buildings and clear the sites.

The original bid to buy and remove the buildings

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[1] The contract provisions in question read as follows:

"* * * The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security."

"* * * In the event the Purchaser fails to complete the removal and clean-up operations within such period of time, the Government may take possession of any property still on the site, destroy and otherwise dispose of it, and may charge the Purchaser with the cost of removing the dwellings and cleaning up the site without crediting the Purchaser with the salvage value of the material or construction work removed."

was made on Pague's behalf. He was also one of the incorporators of Century. He was not, however, one of the contracting parties. The findings and conclusions entered by the trial court do not indicate the basis on which it was held that Pague was liable in damages. There was no finding that he is the alter ego of Century.

From what has just been said, it is plain that Pague is not liable on the theory of breach of contract. It would appear, however, that Pague is in about the same position as Barnett, Owens, and Ester, with respect to possible liability on the theory of trespass or implied contract to pay reasonable rental. The judgment against Pague must therefore be reversed and the cause remanded for further proceedings similar to those which have been specified as to Barnett, Owens, and Ester.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

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